

Q. Now, are you aware of whether any further advice has been given to the company? A. Yes, I am.

Q. Was further advice given? A. Yes, sir.

Q. And by whom? A. By Mr. O'Neill.

Q. Do you recall, Mr. Thompson, what this further advice was? A. I don't have his letter—the letter was—with me, that is. The letter was written, as I recall it,
227 about the 14th or 15th of May to Mr. Wycoff and Mr. O'Neill, and my recollection of it is that he stated—I just don't have it with me.

I don't want to rely on my recollection of what he said in there, but I do know that there was a reply made around May 14th or 15th.

Q. Now, isn't it correct, Mr. Thompson, that Mr. O'Neill stated it as a fact that the policy of the Board was not to assign mediators in cases which were involved in litigation or in which the Board felt that no—that nothing would be accomplished?

Isn't that a fair summary of what Mr. O'Neill said in his letter?

Mr. Shapiro: Objection. The witness has indicated that he doesn't recall the contents of the letter. The letter in any event, will speak for itself.

Since it is a letter to the Florida East Coast Company it is already available to the Company.

Mr. Devaney: The purpose of my question was not to ascertain what the letter says, Mr. Shapiro, and if this does not refresh Mr. Thompson's recollection we will proceed further.

By Mr. Devaney:

Q. I ask again, does this refresh your recollection
228 that Mr. O'Neill made these statements in his letter?

A. No, I couldn't say that that refreshes my recollection to that extent. I don't recall it specifically. I'm sorry.

Q. Now, even though you don't recall whether this was said, Mr. Thompson, is there now a policy in the Media-

tion Board that it will not assign mediators in cases which involve litigation?

Mr. Shapiro: I object to the question. It relates to the mediation practices of the Board and is regarded as privileged, and I instruct the witness not to answer.

Mr. Devaney: Now, Mr. Shapiro, this is a statement which has been made by Mr. O'Neill. At least, I am asking Mr. Thompson that if this were made, if this isn't the policy of the Board, that this has existed in the past.

I think that any privilege that is involved has certainly been waived by the assertion of this statement by the Chairman of the Mediation Board, himself.

Mr. Shapiro: Mr. Devaney, we don't have that letter with us. We don't at this time have a witness who is qualified to testify as to the contents of the letter.

I don't think there is any question of waiver of privilege at this time.

Mr. Devaney: Mr. Shapiro, I don't have a copy of
229 the letter or I would produce it.

Now, Mr. Thompson, if he wants to use the telephone and wants to call his office, can have it read to him. I don't have a copy of it or I would produce it.

And I would ask Mr. Thompson if he would do this. There's no point in pussy-footing about it. He can get on the telephone and find out very quickly what was said in the letter.

I am not trying to be cute about what is in it. I don't have a copy of the letter. This is what was reported to me.

If Mr. Thompson doesn't remember then I suggest that he call and find out and we will all be informed.

Mr. Shapiro: I think that since this deposition proceeding was scheduled at this time, and it is not a deposition duces tecum, that Mr. Thompson is not obliged to call the Board or produce any records.

Mr. Devaney: Now, you don't suggest that this is privileged information, Mr. Shapiro?

Mr. Shapiro: You mean the letter, if it has been written and—

Mr. Devaney: Yes.

Mr. Shapiro: Whatever the letter says it speaks for itself.

230 Mr. Devaney: I have explained that I do not have a copy of the letter here. It was written by Mr. O'Neill, by the Mediation Board Chairman. It was mailed to Florida and I do not have the letter here.

The only place that it would be available in Washington would be in the possession of the Mediation Board itself.

Mr. Shapiro: In any event, sir, the line of questioning seems to be whether the contents of the letter state a general Board policy or whether they relate to something that is confined to the circumstances surrounding the Florida East Coast.

It is as to that that I think we are getting into a question of the Board's general practice respecting the conduct of mediation and it is as to that that I think the privilege would lie.

Since we are in this problem of not having the letter I think that if you want to develop this line at the trial, using the letter, fine, but I don't think we can require Mr. Thompson to answer any questions concerning the Board's general policies in the conduct of mediations.

By Mr. Devaney:

Q. Mr. Thompson, is it the policy of the Board, so
231 far as you have been instructed or know, not to assign a mediator in a case in which you believe no result would be accomplished?

Mr. Shapiro: Again I object to the question on the ground that it deals with the manner in which the Board assigns cases for mediation.

I consider this matter to be privileged.

By Mr. Devaney:

Q. As I understand, Mr. Thompson, you said that there are no regulations concerning the operation of the Mediation Board's mediatory functions.

Is this correct? A. No regulation, no, not that I am aware of, no, sir.

Q. And no written rules? A. Not on mediation cases, no.

Q. Now, Mr. Thompson, has Mr. O'Neill, to your knowledge, assigned a mediator in connection with any of the other Florida East Coast cases, to your knowledge, since April 21st, 1964? A. There have been no assignments made. However, my recollection of that letter that we have been talking about is that it contains the advice to Mr. Wycoff that the mediator will be assigned to certain cases in the near future.

Q. Do you recall whether a particular mediator
232 was named? A. Yes, sir. Frank K. Switzer.

Q. Now, was there earlier correspondence between Florida East Coast and the Mediation Board, Mr. Thompson, concerning the further services of Mr. Newlin? A. The only thing I can recall is a letter from Mr. Wycoff to Mr. O'Neill objecting to some remarks which he stated Mr. Newlin had made when he was down there.

That's about all I can recall on that.

Q. Do you recall a statement by Mr. O'Neill or a letter by Mr. O'Neill that Mr. Newlin would not be assigned to further cases on Florida East Coast A. No, sir, I do not.

Q. Now, have you been instructed by Mr. O'Neill to assign Mr. Switzer to any of these cases? A. Not up to this moment, no.

Q. Has he given you any indication when Mr. Switzer will be assigned to conduct further mediatory efforts? A. No, sir.

Q. Have you made any arrangements with Mr. Switzer as to the availability for assignment to mediate these cases? A. No, I have not.

Q. Does the Mediation Board, Mr. Thompson, have on occasion some connection with the Department of Labor in mediating disputes? A. None whatever to my knowledge.

Q. Now, when the Department of Labor is participating in these disputes, as it did in certain stages of the so-called national rules dispute,—you were aware of their involvement in those proceedings, were you not? A. Yes, sir.

Q. And isn't it true that the Mediation Board and various officials of the Mediation Board worked with and participated with the Department of Labor in the handling of the mediation of these disputes? A. Yes, they did.

Q. So your previous answer is not entirely an accurate answer, that you and the Department of Labor are not associated in any way in the mediation of disputes? A. It is accurate to this extent, that the activities of the Labor Department that we were involved in occurred after the Board had concluded its mediatory efforts.

They were extracurricular activities.

Q. But the Mediation Board was still involved in them.

Is that correct? A. Yes. Mr. O'Neill was involved in it, yes, sir.

Q. And the Mediation Board was kept rather fully advised of the developments in those cases?

A. The Mediation Board was in on all of the developments including the ones over at the White House.

Q. Now, Mr. Thompson, isn't it true that reporters were present at various stages of these negotiations? A. I don't know.

Q. You were never informed that they were? A. No, sir, I don't know.

Q. You don't know that they were or were not?

You just don't know? A. You mean in the national negotiations?

Q. I mean in these—I don't know whether you call them negotiations or what the meetings should be called at the stage that the Department of Labor was involved in them.

I understand there were a series of these meetings but, whatever they were, isn't it true that some of those meetings were conducted with a reporter being present? A. I have no knowledge of it, Mr. Devaney. I don't know.

Q. Have you been informed in any way, Mr. Thompson, by any official of the Department of Labor that they have undertaken mediation in the presence of a reporter? A. No, sir, and I have no contact with the Department of Labor.

235 Q. Now, in your personal experience as a mediator, Mr. Thompson, have you had any occasions on which a reporter was present during negotiations or mediatory proceedings at any stage whatever in your own personal experience?

Mr. Shapiro: I object to that question on the ground that it relates to the performance of the witness' duties as a mediator and is privileged.

Mr. Devaney: This cannot possibly have any privileged character. Mr. Thompson has previously testified that he has not been a mediator since 1951.

Am I correct on that date, Mr. Thompson?

The Witness: I have been in the Secretary's position since 1951, right.

Mr. Shapiro: Well, subject to the objections that one might make as to competency, relevancy and materiality—of course, under the rules we don't ordinarily make these in a deposition proceeding since they are not waived anyway—I will let Mr. Thompson answer in general terms if he can recall.

The Witness: I can't recall any case I ever mediated where a reporter was present.

By Mr. Devaney:

Q. Do you recall any instance when you were a mediator, Mr. Thompson, where a reporter had been used in
236 negotiations before you entered the picture as a mediator? A. I have no knowledge of what transpired during negotiations under normal conditions.

Q. Unless you happened to have been told? A. That's right, unless the file of the case indicates that that has been done.

Q. Now, again in your experience as a mediator do you know of any instance in which a reporter was asked by one or the other parties and objected to by the other party? A. Not in my experience as a mediator. I have never had an occasion of that kind.

Mr. Shapiro: Do you want to break for a few minutes, Mr. Devaney?

Mr. Devaney: All right.

(A short recess was taken.)

By Mr. Devaney:

Q. Mr. Thompson, earlier I asked you about the statement of the document that you referred to in Paragraph 2 of your affidavit which relates to a request, dated September 4, 1963, by the Brotherhood of Railroad Trainmen.

Now, I hand you this document which purports to be a copy of your letter to Mr.—is that addressed to Mr. 237 Rutledge? I believe it is. A. Yes. What is your question?

Q. Would you look at that a moment, Mr. Thompson, and tell me whether you can ascertain from this document whether it appears to be a true copy of the original? A. Yes, it appears to be a true copy,—

Q. Now,— A.—but I didn't sign this letter, however.

Q. You did not sign the letter? A. No, sir.

Q. Who did sign it? A. Mr. Tracy, the Assistant Executive Secretary. I was out of the city when this transaction took place.

Q. But your name is— A. My name was on there, yes.

Q. Now, in looking at these documents you will note that on the letter, which is the next document here—this is a covering letter. This was the M.B. form— A. Yes, sir.

Q. —and on neither of these documents does there ap-

pear any date stamp showing the date that the request was received by the Mediation Board. A. No, there is none shown. That is right.

Q. Now, the last one is the Florida East Coast
238 notice and there is a date stamp showing the date that it was received. A. Yes.

Q. Now, Mr. Thompson, again I ask you is there any reason why the normal procedures were not followed in placing a date stamp on these documents when they were received by the Mediation Board, indicating that they were received by the Mediation Board? A. The answer is, and I can tell you, all applications and letters come into our Board in duplicate. That is one of our practices that everybody understands.

Apparently what has happened here is that a photostatic copy was made of the second copy of the application and letter and the date stamp obviously was placed only on the first copy.

Now, it looks like they didn't make a photostatic copy of the first copy of the letter of transmittal. So that is the only explanation I can give you as to evidently what happened.

Q. Now, when you say in your affidavit that on September 4th, 1963, the Brotherhood of Railroad Trainmen filed—and this does not indicate that you received that on September 4th, 1963, does it? A. Oh, no.

239 Q. In fact, the application indicates that—were they in Cleveland or St. Louis? Cleveland.

This is dated at Cleveland, Ohio, on September 4th. A. That's correct. That is what this affidavit says, that on September 4th they filed their application, and our date refers to the date on the application.

Q. And you have not indicated in your affidavit when that was actually received by the Mediation Board? A. No, sir.

Q. The only indication is that you notified the carrier on September 9, 1963? A. Yes, sir.

Q. And a copy of that is attached as Exhibit No. 21
A. That is right.

Mr. Devaney: I have no further questions at this time. We will, of course, Mr. Shapiro, reserve the right to proceed to obtain a court order requiring the answers to the various questions which you have instructed the witness to refuse to answer.

Mr. Shapiro: I think I have only one or two questions.

Examination by Counsel for Plaintiff

By Mr. Shapiro:

Q. Mr. Thompson, your statements respecting the
240 assignment of mediators to particular cases are based upon your best recollection, is that right, without having the records in front of you? A. That is a general question. I guess my best answer to you is a general answer.

Yes, that is right.

Q. You were asked—strike that, please.

Does the Department of Labor participate in mediation matters which have been docketed with the National Mediation Board prior to the time the Board terminates its services? A. Never, as far as I know.

Q. All right.

Mr. Shapiro: I don't believe I have anything further, Mr. Devaney.

Mr. Devaney: No further questions.

Mr. Shapiro: We will reserve the right, under the rules, to review the testimony and correct it as to matters of—

Mr. Devaney: A typographical nature?

Mr. Shapiro: I believe as to substance also, Mr. Devaney.

Mr. Devaney: Mr. Shapiro declines to waive signature, so we will have it submitted for signature.

Mr. Shapiro: And we will also, of course, reserve
241 our right under Rule 30(e) to make any changes as to form or substance which the witness desires to

make, with a statement of the reason given by the witness for making them.

This is provided for in the rule.

Mr. Devaney: All right.

(I have read the foregoing 49 pages which contain a correct transcript of the answers made by me to the questions therein recorded.)

EUGENE C. THOMPSON
(as corrected)

CERTIFICATE OF NOTARY PUBLIC

I, Thomas H. Doran, Jr., the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me in stenotypy and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken and, further, that I am not a relative or employee of any attorney or counsel employed by the parties
242 hereto, nor financially or otherwise interested in the outcome of the action.

THOMAS H. DORAN, JR.,
*Notary Public in and for the
District of Columbia*

My commission expires
April 15, 1966.

Notary's fee \$., charged to attorney for defendant.

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Filed May 26, 1964

Answer**FIRST DEFENSE**

The complaint filed herein fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

With respect to the numbered paragraphs of the complaint defendant answers as follows:

Count 1

1. Defendant denies that this Court has jurisdiction under 28 U. S. C. § 1345.

2. Defendant admits the allegations contained in paragraph 2 of Count I.

3. Defendant admits the allegations contained in paragraph 3 of Count I.

4. Defendant admits the allegations contained in paragraph 4 of Count I, but further states that the labor organizations representing the other crafts or classes of its employees, numbering nine additional organizations and ten classes or crafts, have joined and participated in the strike and that their members have failed and refused, for the most part, to perform services since January 23, 1963.

244 5. Defendant admits that on September 24, 1963, it served a Section 6 notice on seventeen labor organizations but states that, while the list contained in Exhibit B to the complaint is substantially correct, it is in error in the following respects: notice was sent to the General Chairman, United Transport Service Employees (Red Caps) and to the General Chairman, United Transport Service Employees (Train Porters). Notice was not served

on System Federation No. 69, of the Railway Employees Department, AFL-CIO.

6. Defendant admits that on October 18, 1963, representatives of the defendant met with representatives of the seventeen labor organizations, the meeting having been called for the purpose of discussing defendant's Section 6 notice of September 24, 1963. Defendant further states that the representatives of all seventeen labor organizations refused to bargain and no conference on defendant's proposed Section 6 notice ever commenced. Defendant further admits that the organizations objected to the presence of a court reporter. Defendant denies each and every other allegation contained in paragraph 6 of Count I. Defendant further states that one organization, International Association of Railway Employees, changed its mind and later bargained and the rules contained in the September 24, 1963, Section 6 notice have not been placed into effect as to that organization.

7. Defendant admits that a letter dated October 23, 1963, was addressed to the National Mediation Board but denies that the application was received by the Board on October 23, 1963. Defendant further states that Exhibit 12 attached to the affidavit of Eugene C. Thompson bears a date stamp showing that the letter was received by the Board on October 28, 1963, and that Exhibit 10 attached to the affidavit of Mr. Thompson bears a date stamp showing that the telegram was received on October 25, 1963. Defendant admits that it, pursuant to a request from the Mediation Board on October 25, replied on October 25 that the organizations had refused to enter into collective bargaining as required by Section 2, First; that it was defendant's position that no provision of the Railway Labor Act prohibits the presence of a court reporter; that the organizations failed to fulfill their obligation to negotiate on defendant's notice and were therefore not in a position to avail themselves of the services of the Mediation Board;

and that defendant was free to place proposed rules into effect ten days after termination of the last conference for failure to negotiate as required by the Act. De-
 245 fendant denies each and every other allegation con-
 — tained in paragraph 7 of Count I of the complaint.

8. Defendant admits the allegations contained in paragraph 8 of Count I of the complaint and further states that Exhibit No. 15 attached to the affidavit of Eugene C. Thompson provides that "mediator will be assigned consistent with prior commitments"; however, no mediator has ever been assigned, although a mediator has been assigned in cases docketed after A-7055.

9. Defendant admits that it wrote a letter dated October 30, 1963, addressed to certain labor organizations in which it advised these organizations that defendant would place into effect as of October 30, 1963, the proposed agreement appended to its notice of September 24, 1963, because of these organizations' failure to bargain as required by the Railway Labor Act. Defendant further admits a copy was mailed to Mr. Eugene C. Thompson and that Exhibit 14 attached to Mr. Thompson's affidavit indicates it was received November 6. Defendant states, however, that its letter of October 30 was addressed to sixteen labor organizations and not seventeen as stated in this paragraph of the complaint (see Exhibit 14 attached to the affidavit of Eugene C. Thompson). Defendant further states that the letter of October 30, 1963, was not addressed to the International Association of Railway Employees and that the proposed agreement contained in the September 24, 1963, notice has not been placed into effect with respect to this organization. Defendant denies each and every other allegation contained in paragraph 9 of Count I of the complaint.

10. Defendant admits the allegations contained in paragraph 10 of Count I of the complaint.

11. Defendant denies each and every allegation contained in paragraph 11 of Count I of the complaint.

12. Defendant denies each and every allegation contained in paragraph 12 of Count I of the complaint.

Count II

1. Defendant's answers to paragraphs 1 through 3 of Count I are incorporated herein in answer to the allegations contained in paragraph 1 of Count II which incorporates by reference paragraphs 1 through 3 of Count I of the complaint.

2. Defendant admits the allegations contained in paragraph 2 of Count II.

3. Defendant admits that a meeting was scheduled for August 29, 1963, with the representatives of the seventeen labor organizations, including Brotherhood of Railroad Trainmen, and that the purpose of this meeting was to negotiate concerning defendant's notice of July 31, 1963. Defendant states that the representatives of the seventeen unions refused to negotiate and that the scheduled meeting was terminated before any conference began. Defendant admits that the spokesmen for the seventeen unions stated that they objected to the presence of a court reporter. Defendant further states that it met separately with the representative of American Train Dispatchers Association who bargained on the July 31, 1963, Section 6 notice; and that the proposed termination of union shop agreement has not been made effective as to this organization.

4. Defendant is without knowledge or information as to when an application on behalf of the seventeen labor organizations concerning the July 31, 1963, notice was received and therefore denies the allegations contained in paragraph 4 of Count II of the complaint that it was received on September 6, 1963. Defendant states that the affidavit of Eugene C. Thompson states only that a letter dated September 4, 1963, was filed to which reply was made by the Mediation Board on September 9, 1963, advising de-

fendant of the receipt of this application; that Exhibit 5 attached to the affidavit of Eugene C. Thompson which purports to be a true copy of the original application as received by the Mediation Board shows that it was dated September 4, 1963, at St. Louis, Missouri. Exhibit 6 attached to the affidavit of Eugene C. Thompson is dated September 9, 1963, and would seem to indicate that the request for mediation was received that date. Defendant further states that the attachment to the application for mediation services entitled Appendix No. 1 lists only sixteen labor organizations even though the application was signed by Mr. Leighty on behalf of "seventeen cooperating railway organizations". Defendant admits that it advised the Mediation Board by letter dated September 13, 1963, in

response to the Board's letter of September 9, 1963,
 247 that because the unions had refused to enter into collective bargaining on its notice of July 31, 1963, as required by the provisions of the Railway Labor Act, the termination of the unions' shop agreement had become effective and that the organizations could not now invoke mediatory services of the Board. Defendant denies each and every other allegation contained in paragraph 4 of Count II of the complaint.

5. Defendant admits that by letter dated September 9, 1963, it advised the labor organizations to whom it had addressed its Section 6 notice of July 31, 1963, except American Train Dispatchers Association, that as of September 9, 1963, the union shop agreement was cancelled because of the organizations' refusal to bargain concerning defendant's Section 6 notice of July 31, 1963. Defendant further states that whether or not the Union Shop Agreements have been cancelled, such agreements were not enforceable during the strike and particularly in view of the discrimination practiced against employees hired since January 23, 1963, or who have returned to work since that date, which practices are in violation of the provisions of

the Railway Labor Act. Defendant denies each and every other allegation contained in paragraph 5 of Count II of the complaint.

6. Defendant admits the allegations contained in paragraph 6 of Count II of the complaint and further states that no mediator was ever assigned, even though a mediator has been assigned in cases docketed after A-7027.

7. Defendant admits that by letter dated October 15, 1963, defendant advised the Board, as it had previously on September 13, 1963, that it considered the Union Shop Agreements cancelled because of the unions' refusal to bargain as required by the Railway Labor Act.

8. Defendant denies each and every allegation contained in paragraph 8 of Count II of the complaint.

9. Defendant denies each and every allegation contained in paragraph 9 of Count II of the complaint.

Count III

1. Defendant's answer to paragraphs 1 through 3 of Count I are incorporated herein in response to paragraph 1 of Count III which incorporates by reference the allegations contained in paragraphs 1 through 3 of Count I of the complaint.

2-3. Defendant admits the allegations contained in paragraphs 2 and 3 of Count III of the complaint.

4. Defendant admits that the services of the Mediation Board were invoked by the unions and that the case was docketed as Case No. A-6627, Sub. No. 1, and that mediation was unsuccessful. Defendant states that the unions rejected arbitration and that the Board on October 22, 1962, advised the parties that it was terminating its services. Defendant further states that despite the repeated requests of the company the Mediation Board refused to recommend the creation of an Emergency Board. Defend-

ant denies each and every other allegation contained in paragraph 4 of Count III of the complaint.

5. Defendant admits that it gave notice to each of its employees individually that if the strike, which had been called by the eleven cooperating non-operating organizations, took place as scheduled, his position would be abolished one minute after the strike began. Defendant denies each and every other allegation contained in paragraph 5 of Count III of the complaint.

6. Defendant admits the allegations contained in paragraph 6 of Count III of the complaint.

7. Defendant admits that picket lines were established and that all operating and non-operating employees refused to cross the picket lines. From January 23, 1963, until February 3, 1963, all operations of the company were completely closed down by the strike. On February 3, 1963, defendant operated its first train with supervisory employees. Thereafter, defendant re-established positions and bulletined them in accordance with requirements of the various union agreements. All employees, both those on strike and those who joined and participated in the strike by honoring picket lines, were given the opportunity to bid these jobs. Defendant denies each and every other allegation contained in paragraph 7 of Count III of the complaint.

8. Defendant admits that it operated its first train on February 3 with supervisory personnel. Jobs were
249 bid and all employees were given an opportunity to bid for jobs. Some of the striking employees and some employees who honored the picket lines exercised their right to bid these jobs.

9. Defendant denies each and every allegation contained in paragraph 9 of Count III of the complaint, and states that the strike which commenced on January 23, 1963, suspended operation of agreements during the pendency of

said strike; that the strike created emergency conditions which authorized and permitted Florida East Coast to use the manpower available to it in whatever manner required to provide service to the public.

10. Defendant denies each and every allegation contained in paragraph 10 of Count III of the complaint and states that the document distributed on or about September 1, 1963, entitled "Conditions of Employment" was merely the written embodiment of rules and practices which defendant had been compelled, by the strike, to follow from February 3, 1963, in order to provide service to the public. Defendant admits that these practices were different from the practices contained in the agreements with the various labor organizations but states that the strike and the total withdrawal of manpower made operation under those agreements impossible and during the period of said strike such agreements were suspended and defendant is free during the period of the strike to utilize the manpower available in whatever manner is required to provide service to the public. Defendant further states that its operation under conditions imposed by the strike did not in any way affect or change any agreement with any labor organization and that the labor organizations were free at any time to return to work, in which event they would have returned under the terms of their agreement. Defendant further states that on September 24, 1963, it gave a Section 6 notice of intent to place into effect an agreement entitled "Uniform Working Agreement"; that the organizations refused to bargain concerning the carrier's Section 6 notice and that because the organizations, in violation of their duty under the Railway Labor Act, refused to bargain the carrier properly placed this agreement into effect on October 30, 1963.

11. Defendant denies each and every allegation
250 contained in paragraph 11 of Count III of the complaint and states that from September 1, 1963, until on or about October 30, 1963, it did require each employee to sign for a copy of the document entitled "Conditions of

Employment", which signified his willingness to work thereunder; and that since on or about October 30, 1963, it has required employees hired after that date to sign for a copy of the "Uniform Working Agreement" which became effective on October 30, 1963, and his signature signified his willingness to work thereunder.

12. Defendant denies each and every allegation contained in paragraph 12 of Count III of the complaint.

13. Defendant denies each and every allegation contained in paragraph 13 of Count III of the complaint.

THIRD DEFENSE

The labor organizations listed in Exhibits A, B and C to the complaint which have union shop agreements have, since January 23, 1963, rendered said agreements null and void and unenforceable by their various acts of discrimination against employees of defendant.

FOURTH DEFENSE

Defendant on July 31, 1963, gave a Section 6 notice to the labor organizations listed in Exhibits A, B and C to the complaint, except System Federation 69, of desire to terminate union shop agreements and that said organizations, except American Train Dispatchers Association, refused to bargain and on September 9, 1963, defendant validly cancelled the union shop agreements of said organizations for their failure to bargain as required by the Railway Labor Act.

FIFTH DEFENSE

On September 24, 1963, defendant gave a Section 6 notice of desire to place into effect a new working agreement entitled "Uniform Working Agreement". The organizations listed in Exhibit A, B and C to the complaint, except the International Association of Railway Employees,
 251 refused to bargain and, on or about October 30, 1963, defendant validly placed into effect said agreement

in view of the failure of the organizations to bargain as they are required to do by the provisions of the Railway Labor Act. Defendant has not placed into effect said "Uniform Working Agreement" with respect to the International Association of Railway Employeess.

SIXTH DEFENSE

The Section 6 notices of July 31, 1963, and September 24, 1963, were both validly placed into effect following the unions' refusal to bargain as required by the provisions of the Railway Labor Act. Because the changes contained in these two Section 6 notices were validly placed into effect, the Mediation Board has no jurisdiction; however, even if the National Mediation Board had jurisdiction, the failure and refusal of the National Mediation Board to fulfill its obligations under the Act by (a) promptly assigning a mediator, and (b) using its best efforts to bring the parties to agreement, as required by Section 5, First, of the Railway Labor Act, and the failure and refusal of the National Mediation Board to terminate its services if it has found that its mediatory efforts have failed to bring about agreement, authorized the carrier to place the changes into full force and effect by reason of the Board's dereliction of its duties as imposed by the Railway Labor Act. Because the labor organizations refused to bargain as required by the Railway Labor Act, and because the National Mediation Board has failed and refused to perform the acts imposed upon it by the Act, the changes contained in the July 31 and September 24 Section 6 notices are validly in effect.

SEVENTH DEFENSE

The unions listed in Exhibits A, B and C to the complaint have disclaimed any representative status of employees of Florida East Coast working during the period of the strike and said organizations have disqualified themselves from representing employees of Florida East Coast working during the strike.

EIGHTH DEFENSE

The complaint alleges that defendant has refused and is failing to comply with existing collective bargaining agreements and the Court is without jurisdiction to adjudicate these issues since Sec. 3 of the Railway Labor Act lodges exclusive jurisdiction over all matters involving the interpretation and application of agreements in the National Railroad Adjustment Board (45 U.S.C. § 153).

NINTH DEFENSE

This case involves a labor dispute between private parties and the United States is barred by the Norris-La Guardia Act (29 U.S.C. § 101 et seq.) from resorting to injunctive process in such private dispute.

TENTH DEFENSE

Defendant on July 31, 1963, and on September 24, 1963, served notices under Section 6 of the Railway Labor Act and the labor organizations, on whose behalf or benefit this action is brought, refused to bargain. Accordingly, injunctive relief is barred by Section 8 of the Norris-La Guardia Act (29 U.S.C. § 108).

WHEREFORE, defendant prays that:

A. The relief prayed for by plaintiff be denied and the complaint dismissed;

B. The Court enter its declaratory judgment declaring that the defendant was entitled to and did place the Section 6 notices of July 31, 1963, and September 24, 1963, lawfully into effect when the organizations refused to bargain and that the collective bargaining agreements between defendant and the organizations listed in Exhibits A, B and C to the complaint are validly modified in accordance with the terms of said notices except that the July 31, 1963, Section 6 notice has not been placed into effect with respect to the American Train Dispatchers As-

sociation and the September 24, 1963, Section 6 notice has
not been placed into effect with respect to the Inter-
253 national Association of Railway Employees.

FLORIDA EAST COAST RAILWAY COMPANY

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Date: May 25, 1964

STATE OF FLORIDA }
COUNTY OF DUVAL } ss.

BEFORE ME, the undersigned authority, personally appeared R. W. WYCKOFF, who, being first duly sworn, deposes and says: That he is Vice President and Director of Personnel of defendant; that he has read the foregoing Answer and that the facts stated therein are true.

R. W. WYCKOFF

R. W. Wyckoff

SWORN TO AND SUBSCRIBED before me, this 25th day of May, 1964.

BLANCHE B. REEVES

Notary Public,

State of Florida at Large

My commission expires: May 7, 1968

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Filed May 26, 1964

Motion to Dismiss Complaint

Defendant, Florida East Coast Railway Company, moves the Court as follows:

1. To dismiss the action on the ground that the Court lacks jurisdiction because plaintiff lacks standing to litigate and there is no case or controversy existing between plaintiff and defendant within the meaning of Article III, Section 2, of the United States Constitution.

2. To dismiss the action on the ground that the plaintiff is not the real party in interest within the meaning of Rule 17(a) of the Federal Rules of Civil Procedure.

3. To dismiss the action on the ground that the Court lacks jurisdiction to grant the relief requested by virtue of Sections 2 and 3 of the Railway Labor Act, 45 U.S.C. 152 and 153, and Sections 1, 7 and 8 of the Norris-La Guardia Act, 29 U.S.C. 101, 107 and 108.

Signed WILLIAM B. DEVANEY
Attorney for Defendant

Address: 1100 Shoreham Bldg.,
Washington 5, D. C.

Signed J. TURNER BURTON
Attorney for Defendant
814 Florida Title Bldg.,
Jacksonville, Fla.

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**Memorandum in Support of Motion to
Dismiss Complaint**

1. In its complaint herein the United States of America alleges that this Court has jurisdiction under 28 U.S.C. 1345, which provides that the District Court shall have original jurisdiction of cases in which the United States

is plaintiff. It is well established, however, that no action may be brought in a Federal Court where plaintiff's interest is not sufficient to satisfy the Constitutional requirement that there be a "case" or "controversy."¹ The complaint shows on its face that plaintiff lacks such an interest, and thus lacks standing to litigate this case. The complaint shows that the United States is suing as representative of the labor organizations listed in plaintiff's Exhibits A, B and C appended thereto. Plaintiff attempts to justify its action on behalf of one of the parties to a private labor dispute as follows:

"This is a matter of the greatest public concern, not only because it has resulted in a continuing strike that carries with it disruption, and a constant potentiality of greater disruption to interstate commerce, but because such a wholesale avoidance of the constructive collective bargaining which the Act is supposed to ensure destroys as well the effectiveness of the nation's railway labor policy."²

257 It is, or should be apparent, that noble words will not give the Government standing in this case. If there actually were a serious "disruption" of interstate commerce as was presented in the case of *In re Debs*, 158 U.S. 564 (1895), cited by the Government, perhaps the United States would have standing to sue under the Commerce Clause of the United States Constitution. See also *United States v. Brotherhood of Railroad Trainmen*, 96 F. Supp. 428 (N.D. Ill. 1951). But the Government cannot allege that in the instant case it has standing to sue under the Commerce Clause. Moreover, the Supreme Court has specifically held that the Norris-La Guardia Act (29 U.S.C. 101 et seq.) barred the intervention of the

¹ *Tlleston v. Ullman*, 318 U.S. 44 (1943); *Frothingham v. Mellon*, 262 U.S. 447 (1923).

² Memorandum in Support of Preliminary Injunction, pp. 20-21.

United States in labor disputes between private parties, *United States v. United Mine Workers of America*, 330 U.S. 258, 277-78. Consequently, when, as here a labor dispute between private parties is involved, cases such as *In re Debs* have no application.

Nevertheless, even if a suit by the United States were not barred by the Norris-La Guardia Act, the instant suit would not be proper because the Government does not have standing to sue under the Commerce Clause.

On the facts here, there is neither disruption nor potential disruption to interstate commerce. As is shown by the record in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, C.A. 64-40-Civ.J., Court of Appeals No. 21,356, a case now submitted on appeal to the United States Court of Appeals for the Fifth Circuit, the allegation that there has been a disruption of interstate commerce is patently false. As the affidavit of Winfred L. Thornton in that case states,

"This graph (J.A. 47, 48) shows that the traffic now being handled by the railway well exceeds the traffic at the end of the year 1963 and further is approximately 95% of the traffic handled in January, 1962." (J.A. 44).

Where, then, is the disruption of interstate commerce? Does a strike called by a union constitute a disruption of commerce by the employer? Does an alleged violation of the Railway Labor Act constitute a disruption of commerce, *per se*? If these questions be answered "yes," the United States may become a party to any labor dispute merely by alleging that a strike has been called or an act violated, *quid absurdum est*.

Since there is clearly no disruption of interstate commerce, the Government's true position is that it has a right to bring this action to protect "the effectiveness of the

nation's railway labor policy."³ A similar contention was disposed of by judge Lewis in *Allen v. County School Board*, 28 F.R.D. 358 (D.C. E.D. Va. 1961) as follows:

"The Attorney General cites numerous cases in support of his contention that the United States by virtue of its national sovereignty has a sufficient general interest in this case to be permitted to intervene of right. Suffice it to say that none of the cited cases are sufficiently in point with the facts in this case to sustain his contention.

" 'It is well settled that the only interest which will entitle a person to the right of intervention in a case is a legal interest as distinguished from interests of a general and indefinite character which do not give rise to definite legal rights.' See *Jewell Ridge Coal Corp. v. Local No. 6167, etc.* (D.C.), 3 F.R.D. 251. See also *Radford Iron Co. Inc. v Appalachian Electric Power Co.* (4 Cir.), 62 F. 2d 940."

The Government cites as authority *In re Debs, supra*, *United States v. American Bell Telephone Company*, 128 U.S. 315 (1888) and *the United States v. City of Jackson*, 318 F. 2d 1, 11-16, *rehearing denied*, 320 F. 2d 870 (1963). All three cases base the standing of the Government to sue on the doctrine that,

"The Commerce Clause in itself prohibits obstruction to interstate commerce and that the United States has standing to sue for injunctive relief to enforce the Commerce Clause."⁴

In the present case, no such obstruction can be shown to exist, and plaintiff's authorities are therefore inapplicable.

³ Concededly, there is no statutory authorization in the Railway Labor Act which permits the United States to bring an action like the present one.

⁴ 318 F. 2d, p. 14.

It may be plaintiff's position that any alleged *future* violation of the Railway Labor Act constitutes a violation of the Commerce Clause sufficient to give the United States standing to sue. As the Government states at pages 21-22 of its Motion for Preliminary Injunction:

259 "In the instant case it is evident that a breakdown in the functioning of the National Mediation Board or of the collective bargaining process as required by the Railway Labor Act, due to the behavior of the railroad subject to the Act, imperils the free flow of commerce."

The key word in this statement is "imperils". In this case there is no *present* obstruction. Can the Government obtain standing to sue merely by alleging that there is a *threat* or *peril* of obstruction to interstate commerce? For the Court to adopt this novel and unprecedented position would be to go one giant step beyond *U.S. v. City of Jackson, supra*, which based standing to sue not on any possible threat or peril to interstate commerce, but on a finding that a present obstruction of interstate commerce existed.⁵ In the present case, by contrast, no such finding of fact is possible.

Therefore, since the Government's complaint shows that there is no present obstruction to interstate commerce, and since the Government has no proprietary interest of any kind in the present action,⁶ it has no standing to litigate, and this case should be dismissed for lack of existence of a case or controversy.

2. 28 U.S.C. 1345 gives the Court no jurisdiction over the instant case if the United States is not the "true party in interest" within the meaning of Rule 17(a) of the Fed-

⁵ *Ibid.*, p. 15.

⁶ *Cf. United States v. San Jacinto Tin Company*, 125 U.S. 273 (1888).

eral Rules of Civil Procedure.⁷ The true parties in interest in this case are the labor organizations listed in Exhibits A, B, and C to the complaint, eleven of which filed a petition to intervene on May 7, 1964.

The three counts of the complaint allege that, by placing into effect the Section 6 notices of September 24, 1963, and July 31, 1963, and distribution of a document entitled, "Conditions of Employment", on September 1, 1963, Florida East Coast Railway Company violated Section 2, First, Second and Seventh, Section 5, and Section 6 of the Railway Labor Act, 45 U.S.C. Section 152, First, Second and Seventh, Section 155 and Section 156. When

260 summarized, these charges boil down to two: (a) that by operating during the strike with the manpower available as its needs required, FEC unilaterally changed rules and working conditions in violation of the Railway Labor Act; and (b) that FEC failed to bargain in good faith with the unions (a remarkable assertion since plaintiff admits that the unions refused to bargain) and unilaterally changed rules and working conditions in violation of the Railway Labor Act.

As discussed hereinafter in Paragraph 3, any question concerning the interpretation and application of an existing agreement is reserved by the Act to the exclusive jurisdiction of the Adjustment Board and this Court is without jurisdiction as to such matter.⁸ Nevertheless, if there is injury to anyone because of FEC's alleged failure to bargain or FEC's allegedly unlawful unilateral changes, that injury is to the unions, not to the United States. As the unions themselves state in their Motion to Intervene herein,

⁷ *United States ex. rel. State of Wisconsin v. First Federal Savings & Loan Association*, 248 F. 2d 804 (7th Cir. 1957), cert. denied 355 U.S. 957 (1958).

⁸ *Aaxico v. Airlines Pilots Association*, — F. 2d —, 55 LRRM 2982, (5th Cir. 1964).

“... they represent the employees of the defendant whose rights are the subject matter of the plaintiff's complaint and they are the contracting parties, with the defendant, to the collective bargaining agreements which are the subject matter of the main action ...”

That the unions are the true parties in interest is further revealed by analysis of the Government's complaint. Count II, for example, charges that FEC unlawfully cancelled the union shop agreement by placing into effect on September 9, 1963, the proposal to this effect contained in its notice of July 31, 1963. Clearly, if the union shop agreement is void and unenforceable as to the unions because of discrimination by the unions against strike replacements, the United States cannot be permitted to enforce this agreement on behalf of the unions. And, indeed, as shown by the argument in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, Court of Appeals No. 21,356, Brief for Appellant, pages 42-49, this is a major issue in the dispute as to whether the union shop agreement was properly cancelled. Even if, as the Government alleges, FEC, in cancelling the union shop agreement, acted in blatant disregard of the National Mediation Board's jurisdiction, discrimination by the union would render the agreement unenforceable and moot

261 the Government's case. Obviously, the proper parties to this dispute are the unions and the company, and the Government has no place in it.

Similarly, Count III of the complaint charges that in entering into individual contracts with the strike replacements differing from the collective bargaining agreements existing prior to the strike, and by distributing a document entitled “Conditions of Employment”, on September 1, 1963, FEC violated the Railway Labor Act. This is an almost grotesque attempt to characterize an alleged breach of contract as a violation of the Railway Labor Act, so as to make it seem that the union's interest is also the public

interest. Obviously, as was argued in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, Court of Appeals No. 21,356, Brief for Appellant, pages 20-36, if the strike suspended the operation of the collective bargaining agreements, all temporary arrangements made by the company with the strike replacements during the pendency of the strike would be entirely lawful. The proper parties to argue the question whether or not the collective bargaining agreement was suspended or was violated are the company and the unions. This seems too clear to merit discussion.

Finally, Count I of the complaint alleges that FEC violated the Railway Labor Act in putting into effect on October 30, 1963, the rules changes proposed by a Section 6 notice on September 24, 1963. FEC's position with regard to said action, as previously argued in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, Court of Appeals No. 21,356, Brief for Appellant, pages 46-49, is that refusal by the unions to bargain in good faith with respect to these changes gave the company the right to put them into effect. The central question in this dispute is whether, as asserted by the Government, FEC's insistence upon the presence of a reporter at the bargaining sessions was tantamount to a bad faith refusal to bargain, or whether, as contended by FEC, the union's refusal to meet in the presence of a reporter, was evidence of the duty to bargain, on their part. The proper parties

to this dispute, are the company and the unions.

262 The present case, therefore, presents a clear example of the United States gratuitously attempting to protect the interests of a group perfectly capable of defending itself, under the guise of protecting the "public interest." The eleven unions who moved to intervene on May 7, 1964, are undoubtedly true parties in interest within the emaning of Rule 17(a) of the Federal Rules of Civil Procedure. Plaintiff's action should therefore be dismissed.

3. Even if the United States has standing to bring this action, the Court is deprived of jurisdiction over the subject matter thereof by the Railway Labor Act, Sections 2 and 3 (45 U.S.C. 152 and 153) and the Norris-La Guardia Act, Sections 1, 7 and 8 (29 U.S.C. 101, 107 and 108).

(a) The Railway Labor Act distinguishes sharply between disputes "concerning changes in rates of pay, rules, or working conditions" (45 U.S.C. 155, *First*, (2)) and disputes "growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions . . ." (45 U.S.C. 153, *First*, (i)). Disputes of the first class, sometimes called "major", which "look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past" may be referred to the National Mediation Board pursuant to Section 6 of the Act. Disputes of the second class, often called "minor", which "contemplate(s) the existence of a collective agreement already concluded" and which "relate(s) either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case,"¹⁰ are committed to the *exclusive jurisdiction* of the National Railroad Adjustment Board.¹¹ This means that insofar as a complaint seeks enforcement of a collective agreement alleged to have been violated, a

⁹ *Elgin, Joliet & Eastern Ry. Co. v. Burley*, 325 US 711 at 722-23 (1945).

¹⁰ *Id.*

¹¹ *Hettenbaugh v. Airline Pilots Association*, 189 F. 2d 319 (5th Cir. 1951); *Fingar v. Seaboard Air Line Railroad Co.*, 277 F. 2d 698 (5th Cir. 1960); *Britton v. Atlantic Coast Line Railroad Co.*, 303 F. 2d 274 (5th Cir. 1962); *King v. Atlantic Coast Line Railroad Co.*, 323 F. 2d 1005 (5th Cir. 1963); *St. Louis, S.F. & T. Ry. Co. v. Railroad Yardmasters of America*, . . . F. 2d . . . , 55 LRRM 2583 (5th Cir. 1964) rev'g, 218 F. Supp. 193 (N.D. Tex. 1963); *Aaxico v. Airlines Pilots Association*, — F. 2d —, 155 LRRM 2982 (5th Cir. 1964.)

263 federal court has no jurisdiction to grant such relief. As the Court stated in *Hettenbaugh v. Airline Pilots Association*,¹²

"The Congress did not, by the Railway Labor Act, grant jurisdiction to the Federal courts to afford relief for breaches of performance of collective bargaining agreements. Appropriate quasi-judicial tribunals have been established for that purpose. *Slocum v. Delaware, L. & W. R. Co.*, 339 US 239, 70 S. Ct. 577, 94 L. Ed. 775."

The complaint of the United States in the instant case shows on its face that it seeks, in large part, to enforce performance of a collective bargaining agreement. Count III of the complaint, paragraphs 9, 10, 11, and 12, alleges that FEC has violated various sections of the Railway Labor Act in entering into individual agreements with its employees, most of whom are strike replacements, during the period of the strike, since said individual agreements are not drawn in accordance with the provisions of the collective bargaining agreements in force with respect to the employees now on strike. Count III also alleges that distribution of a document entitled "Conditions of Employment" to employees working during the strike period violated the Railway Labor Act since said "Conditions of Employment" differ from the provisions of the collective bargaining agreements in force with respect to employees on strike. *This count alleges nothing more than breach of contract.* The United States does not, and cannot suggest that the processes of the Railway Labor Act to be utilized in the case of a major dispute have any applicability in this instance, nor is the jurisdiction of the National Mediation Board over this dispute even suggested. Indeed, Counsel for the Government in an ancillary pro-

¹² 189 F. 2d at 321.

ceeding on a motion to Quash Subpoenas, D.C.D.C. misc. Docket No. 10-64 stated as follows:

"The first, temporary conditions of employment has no relationship to the National Mediation Board since the board was never—since a Section 6 notice was never served and that, therefore, the Board's processes have never been invoked". (Transcript of Proceedings before the Honorable Edward M. Curran, U.S. Dist. Judge, Monday, May 18, 1964, p. 6).

It is FEC's position that the strike by the eleven non-operating organizations suspended the operation of the collective bargaining agreements by making compliance therewith impossible; but whether or not 264
FEC is correct in adopting this position, *the extent to which the company is bound by a pre-existing collective agreement is obviously a matter within the exclusive jurisdiction of the NRAB.*

Counts I and II of the complaint appear on the surface to arise out of a "major dispute" between the company and the unions in that they allege that FEC, after properly giving the Section 6 notices of September 24, 1963 ("Uniform Working Agreement") and July 31, 1963 ("Cancellation of Union Shop"), unlawfully refused to bargain by insisting upon the presence at the negotiations of a court reporter, and unlawfully placed the proposed changes into effect by so informing the labor organizations although, in each case, the National Mediation Board had assumed jurisdiction. But the Government's prayer for relief goes further; it asks that "the defendant Florida East Coast Railway Company . . . be restrained from (a) in any manner continuing in effect or implementing in any respect the changes in rates of pay, rules or working conditions announced in its notices of September 24, 1963, and July 31, 1963. . . . (b) taking any action under any further notice attempting to make changes in rates of pay, rules or work-

ing conditions, except in accordance with the procedures of § 6 of the Railway Labor Act.”¹³ Consequently, it is clear from the prayer that this is not a request for an injunction against alleged violations of the Act, but for immediate enforcement of pre-existing collective bargaining agreements. In order to enjoin FEC from taking any further action under its Section 6 notices or from issuing new notices, the Court must find that the collective agreements have not been suspended by the strike but are presently in force. Obviously a declaratory judgment or injunction which restrains FEC from acting contrary to the terms of the collective agreements *at the present time* enforces said agreements over FEC’s objection that they are not now in effect. Clearly, a determination as to the applicability of the collective agreements is within the
 265 exclusive jurisdiction of the NRAB, and may not be made by this Court.¹⁴

(b) The Norris-La Guardia Act, which is not adverted to anywhere in the Government’s complaint, motion for preliminary injunction, or memorandum in support of said motion, clearly bars injunctive relief in this case, whatever other alternatives by way of relief may be available. The United States concedes that it has no proprietary interest in this case, but is attempting only to defend the “public interest” (Memorandum in Support of Motion for Preliminary Injunction pp. 20-22). This is precisely the type of action by the Government which the Supreme Court, in *United States v. United Mine Workers of America*,¹⁵ expressly held to be barred by the Norris-La Guardia Act:

“In the debates in both Houses of Congress numerous references were made to previous instances in which

¹³ Complaint, p. 10.

¹⁴ *Aaxico v. Airlines Pilots Association*, — F. 2d —, 55 LRRM 2982 (5th Cir. 1964). See also other cases cited in n.11 to the same effect.

¹⁵ 330 US 258, 277-278.

the United States had resorted to the injunctive process in labor disputes between private employers and private employees, where some public interest was thought to have become involved. These instances were offered as illustrations of the abuses flowing from the use of injunctions in labor disputes and the desirability of placing a limitation thereon. The frequency of these references and the attention directed to their subject matter are compelling circumstances. *We agree that they indicate that Congress, in passing the Act, did not intend to permit the United States to continue to intervene by injunction in purely private labor disputes.*" (Emphasis supplied).

This is a "private labor dispute" between FEC and the labor organizations named in Exhibits A, B and C appended to the complaint herein. Allegations of a public interest in the outcome of the dispute do not make it any the less a private dispute within the meaning of *United Mine Workers, supra*.

The language of Section 7(29 U.S.C. 107) of the Norris-La Guardia Act shows clearly that the United States was not intended to escape the purview of the Act by allegations of "public interest":

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined . . . except after findings of fact by the court, to the effect—

* * *

266 (b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief . . ."

Neither of these findings can properly be made by the Court in the instant case. As pointed out above, there can be no showing by the United States that "substantial and irreparable injury" to its property will follow if injunctive relief is not granted Section 7(b) of the Act, since no property of the United States is involved. Moreover, there can be no showing in accordance with Section 7(c) that greater injury will be inflicted upon the United States by denial of relief than will be inflicted on the FEC by the granting of relief, since the United States Court of Appeals for the Fifth Circuit granted defendant's motion to stay the preliminary injunction issued in *Brotherhood of Railroad Trainmen v. Florida East Coast Railway Company*, C.A. 64-40, pending appeal.¹⁶ Defendant's motion was granted on the basis of evidence, *inter alia*, that adherence at the present time to collective bargaining agreements in force before the beginning of the strike would virtually force the railroad out of business. Since the injunction requested by the United States in the present case would have the same effect it is *res judicata* that such an injunction will cause irreparable injury to the defendant and to its public which it serves.

Even if it were to be held that the Norris-La Guardia Act does not, *ipso facto* bar the United States from bringing such a "public interest" action as this, the Court would be unable to make the further findings required by Section 7(a) and (d) of the Act, and injunctive relief must still be denied. Absent the finding (which the Court has no power to make) that all collective agreements between Defendant and the labor organizations remain in force during the strike, the Court cannot find that "unlawful acts" within the meaning of Section 7(a) are now being committed or will be committed in the immediate future unless restrained. If, as contended by defend-

¹⁶ Motion granted, *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, Court of Appeals No. 21,356, March 14, 1964.

ant, the collective agreements are now in suspension, the only possible unlawful acts by defendant could occur after the strike ends. At this time the Government alleges only contract violations, which are not "unlawful acts" within the meaning of Section 7(a) of the Norris-LaGuardia Act.¹⁷ As the Court said in *BRT v. Central of Georgia Ry. Co.*,

"It is plain from the language and the context that the words 'unlawful acts' mean violence, breaches of the peace, criminal acts, etc., and that such terms do not include, they do not constitute a general reference to, anything that may be considered illegal but apply specifically to the acts of violence which authority is calculated to control."¹⁸

For similar reasons, there is an "adequate remedy at law" within the meaning of Section 7(d) in proceedings before the National Railroad Adjustment Board.

Finally, the United States is barred from bringing the present action by Section 8 of the Norris-La Guardia Act, which states:

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available Government machinery of mediation or voluntary arbitration." (Emphasis supplied).

The United States bases its case in large part on the necessity which it feels for protecting the jurisdiction of the

¹⁷ *United Packing House Workers of America v. Wilson & Co.*, 80 F.Supp. 563 (N.D.Ill. 1948); *BRT v. Central of Georgia Ry. Co.*, 229 F. 2d 901 (5th Cir. 1956) vacated, remanded for dismissal because of mootness, 243 F. 2d 793 (5th Cir. 1957); *Wilson & Co. v. Birl*, 105 F. 2d 948 (3rd Cir. 1939).

¹⁸ 229 F. 2d at 905.

National Mediation Board, whose functions are allegedly being frustrated by the actions of FEC.¹⁹ But it is the National Mediation Board rather than the railroad which has failed to comply with its obligations under the Railway Labor Act. Section 5, *First*, of the Railway Labor Act directs that where the jurisdiction of the National Mediation Board is invoked by a party to a dispute, or
 268 where the National Mediation Board proffers its services,

“in either event the said board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement.”

This section creates a duty on the part of the National Mediation Board to communicate promptly with the parties and to assign a mediator with reasonable speed. This duty the Board has flagrantly violated.

Defendant does not contend that Section 5, *First*, of the Railway Labor Act should be read so as to impose a rigid time-table on the Board. Defendant does contend the section has meaning and, at the very least, requires the National Mediation Board to offer sound and sufficient reasons for its failure to act promptly with regard to disputes between defendant and the various unions docketed by it since April 30, 1962, and not acted upon,²⁰ when, at the same time, the Board has communicated with the parties and appointed mediators in other disputes docketed by it much more recently. These facts raise an inference, first, that the Board, for reasons known only to itself, has failed to comply with the duty imposed upon it by Section 5, *First*, of the Act, and second, that the Board is discriminating

¹⁹ Complaint for Injunction, pp. 2, 3, 4, 5, 6, 10.

²⁰ A list of disputes docketed between FEC and various labor organizations docketed by the National Mediation Board, and correspondence thereon between R. W. Wyckoff and F. A. O'Neill, Jr., appended to this motion as Exhibit A.

in violation of the Fifth Amendment to the United States Constitution. Since the United States does not come to this Court with clean hands, both Section 8 of the Norris-La Guardia Act and general equitable principles deprive the Court of jurisdiction over any claim by the United States for injunctive relief.

269 WHEREFORE, for the foregoing reasons, defendant respectfully prays that the complaint of the United States of America be dismissed.

FLORIDA EAST COAST RAILWAY COMPANY

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Dated: May 25, 1964

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Filed May 26, 1964

**Motion to Dismiss Complaint of Intervenor and to Deny
Motion to Intervene**

Comes now defendant, Florida East Coast Railway Company, and moves the Court as follows:

1. To dismiss the complaint of intervenors and to deny their motion to intervene on the ground that the Court

lacks jurisdiction over the subject-matter thereof by virtue of Sections 2 and 3 of the Railway Labor Act, and Sections 1, 7 and 8 of the Norris-La Guardia Act.

2. To dismiss the complaint of intervenors and to deny their motion to intervene on the ground that the principal action in this case must be dismissed for want of jurisdiction and because it is not prosecuted in the name of the true party in interest.

3. To dismiss the complaint of intervenors and to deny their motion to intervene on the ground that intervention in the instant case is permissive in nature and would result in delay and complication of the case to the prejudice of defendant's rights.

Signed: WILLIAM B. DEVANEY

Attorney

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Wash. 5, D. C.

Signed: J. TURNER BUTLER

Attorney for Defendant

Address: 814 Florida Title Bldg.

Jacksonville, Florida

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**Memorandum in Support of Motion to Dismiss
Complaint of Intervenors and to Deny
Motion to Intervene**

1. For reasons advanced in defendant's memorandum in support of motion to dismiss the principal complaint herein, the Court lacks jurisdiction over the subject-matter of intervenors' complaint.

The relief requested by intervenors in their complaint herein is identical to that requested by plaintiff the United States of America in its principal complaint.¹ Since, as

¹ Complaint of Intervenors, pp. 4-5; Complaint of United States, pp. 10-11.

has been shown,² the granting of such relief would amount to the enforcement of existing collective agreements and would depend upon the interpretation and application of existing collective agreements, the Court's jurisdiction is withdrawn by Sections 2 and 3 of the Railway Labor Act, which commit the decision of such questions to the exclusive jurisdiction of the NRAB.

Moreover, as in the case of the principal complaint herein, the Norris-La Guardia Act, Sections 1, 7 and 8, bars the injunctive relief requested. The findings required by Section 7 of the Norris-La Guardia Act cannot be made by this Court for the following reasons:

(a) allegations of contract violations are not unlawful acts within the meaning of Section 7(a);³

272 (b) it is *re judicata* that greater injury will be inflicted upon FEC by granting of relief than will be inflicted on the unions by denial of relief (see Section 7(c));⁴ and

(c) intervenors have a plain and adequate remedy at law within the meaning of Section 7(d) in proceedings before the NRAB.⁵

Furthermore, Section 8 of the Norris-La Guardia Act, which is believed to prevent the United States from obtaining the requested injunction in the principal action, also stands in the way of intervenors' prayer for relief. Intervenor refused to bargain with respect to the Section 6 notices named in their complaint,⁶ allegedly because of the presence of a reporter at negotiations, although they

² Memorandum in Support of Motion to Dismiss Complaint, Par. 3, pp. 8-16.

³ *Ibid.*, p. 14, n. 17.

⁴ *Ibid.*, p. 13.

⁵ *Ibid.*, p. 14.

⁶ Complaint of Intervenor, pp. 2-3.

had not raised this objection in connection with previous negotiations. The unions' complaint skims over these facts, stating merely that "conferences" were "held" on said notices,⁷ but these are facts of record on the pleadings,⁸ and show conclusively that intervenors have not fulfilled the obligations imposed by Section 8 of the Norris-La Guardia Act as prerequisites to the bringing of an action for injunctive relief. A similar objection may be based upon the intervening unions' failure to make membership therein available to all FEC employees, which failure, as in a related case now pending before the Fifth Circuit,⁹ should render the union shop agreements whose cancellation is complained of null, void and unenforceable as to the discriminating unions.

Therefore, the complaint of intervenors should be dismissed, and their motion to intervene denied.

273 2. Since the complaint of the United States herein should be dismissed for want of jurisdiction and for violation of Rule 17(a) of the Federal Rules of Civil Procedure, the subsidiary complaint of intervenors must also be dismissed, and the motion to intervene must be denied.

As shown in defendant's memorandum in support of motion to dismiss the principal complaint herein, Paragraphs 1 and 2, the principal complaint must be dismissed for want of jurisdiction and because the United States is not the true party in interest. But if this Court has no jurisdiction over the principal action, the entire action should be dismissed, for intervention will not serve as a means of conferring jurisdiction.¹⁰ There can be no

⁷ *Id.*

⁸ Complaint of United States, pp. 2, 4.

⁹ *B.R.T. v. Florida East Coast*, Court of Appeals No. 21,356; See Brief for Appellant, pp. 42-49.

¹⁰ *Cochrane v. Potts*, 47 F. 2d 1027 (5th Cir. 1931); *Hill v. Wilson*, 219 F. 2d 200 (5th Cir. 1914).

intervention where the main action is dismissed, since the intervention depends upon the existence of a principal action and is subordinate thereto.¹¹

There is every reason to apply the foregoing rules in the present case. Intervenorors have presented a "skeleton" complaint containing only the barest outlines of a statement of facts and virtually no discussion of the injury allegedly suffered, or the rights allegedly violated by FEC. Intervenorors' complaint was obviously intended to be dependent upon and supplementary to the principal complaint herein; standing alone it is subject to a motion for a more definite statement, or, in the alternative to a motion to dismiss for failure to state a claim upon which relief can be granted. Proper procedure dictates, therefore, that the complaint of intervenorors be dismissed and their motion to intervene denied.

3. The motion to intervene herein is, in any event, fatally defective in that it does not show sufficient grounds either for intervention as of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure or for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

274 Rule 24(a) of the Federal Rules of Civil Procedure requires as a condition of intervention as of right that the intervenor show *both* that he will be bound by the court's decree *and* that the representation of his interest is presently inadequate. Since intervenorors herein do not make the latter contention, and it is doubtful, in fact, whether they make the former, there can be no intervention as of right.

Treated, then, as a request for permissive intervention pursuant to Rule 24(b) the motion of intervenorors alleges that common questions of law and fact underlie their complaint and the principal complaint herein. But this

¹¹ *Hofheimer v. McIntee*, 179 F. 2d 789 (7th Cir. 1950).

showing is insufficient to justify an exercise of discretion by the Court in favor of permitting intervention by the unions. Obviously such intervention would increase the number of parties (the unions are eleven in number!), greatly multiply issues of fact, make it necessary to cross-examine a much larger number of witnesses and delay the case. In order for the Court to permit such an intervention, which would appear to be to the prejudice of defendant's rights, it must be shown with far more detail that intervention is necessary in this case. Since this showing has not been made by the unions, and since it cannot, in all probability, be made, intervenors' complaint should be dismissed and their motion to intervene denied.

WHEREFORE, dependant respectfully prays that the complaint of intervenors be dismissed and the motion to intervene here be denied.

FLORIDA EAST COAST RAILWAY COMPANY

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Date: May 25, 1964

Filed May 27, 1964

Motion to Compel Answer

On Wednesday, May 20, pursuant to notice filed in this matter, the deposition of Eugene C. Thompson, called for examination by counsel for the defendant, was taken at Washington, D. C. In response to numerous questions the witness was instructed not to answer on the claim of administrative privilege. Defendant moves the Court for an Order requiring that deponent Eugene C. Thompson be required to answer the following questions:

1. "Q. And do mediators customarily make notes, during the course of their meetings with the parties, from which they prepare this report?

"A. Some do and some don't." (p. 8)

2. "Q. With those who do have you found that this interferes in any way with the course of negotiations?

277 "Mr. Shapiro: Objection. This deals with the proceedings and techniques by which the Board conducts its mediations and, as to these matters, the practice is privileged, and I instruct the witness not to answer." (p. 8)

3. "Q. Now, do you recall, Mr. Thompson, that in this report that Mr. Newlin indicated that the company had requested that he proceed with his mediatory efforts, and that he had declined to do so?

"Mr. Shapiro: Objection. The contents of the mediators' reports to the Board are confidential. They relate to the manner in which the Mediation Board conducts its mediation functions.

"They are privileged and I instruct the witness not to answer." (p. 9)

4. "Q. Did Mr. Newlin report in this report, Mr. Thompson, any conversations between himself and officials of the Florida East Coast Railway Company?

"Mr. Shapiro: I object to the question on the ground that the contents of the mediator's report are privileged, and I instruct the witness not to answer." (p. 10)

5. "Q. Mr. Thompson, in the course of your experience with the Mediation Board, first as a mediator and then as Executive Secretary, isn't it true that reporters have sat in on mediations on various occasions?

278 "Mr. Shapiro: I object to the question on the ground that this deals with the practices and procedures of the Board, in conducting mediation, and I instruct the witness not to answer.

"Mr. Devaney: Now, what is confidential, Mr. Shapiro, in connection with this? You have indicated that the others relate to procedures.

"I am asking him whether it ever occurred. It is a simple factual question. He can either say yes or no or he doesn't know.

"Mr. Shapiro: Well, it seems to me that the knowledge of the witness as to whether or not the Board has permitted the use of reporters or whether mediations in any given case have proceeded with the presence of reporters deal with what has transpired in other mediations.

"Now, what goes on in a mediation is completely privileged, Mr. Devaney." (pp. 10, 11)

6. "Q. Mr. Thompson, isn't it true that you have told officials of the Florida East Coast that mediation has proceeded in other cases in the presence of reporters?

"A. I don't recall any conversation with an official of the Florida East Coast Railway Company, Mr. Devaney.

"Q. To your knowledge, did not—if you did not have such a conversation were you informed by a member of the Board that such a conversation had taken place?

"Mr. Shapiro: Objection. This calls for a communication between the Executive Secretary and a member of the Board." (p. 12)

279 "Q. Now, was there any reason, Mr. Thompson, why these particular cases, including five cases docketed by your Board on or after January 1st of 1964, were assigned to a mediator whereas cases going back earlier in 1963, and the one in 1962, have not been assigned to a mediator?

"Mr. Shapiro: I object to the question on the ground that this deals with the reason why the Board assigns or does not assign mediators. It relates to its deliberations and is, therefore, privileged." (pp. 20, 21)

8. "Q. No, does your answer relate to a particular procedure for the Florida East Coast cases as distinguished from other cases?

"Mr. Shapiro: I think I am going to object to that question on the ground that it again relates to the manner in which the Board assigns cases for mediation.

"It concerns the deliberations of the Board. The witness has answered that he will not assign these cases except upon instructions of the Board.

"I am instructing him not to answer." (p. 22)

9. "Q. What action is contemplated or is normal for the Board to take when it is considering these cases?

"Mr. Shapiro: Objection. That goes to the Board's deliberative processes. It goes to the practice of the Board in conducting mediation.

"I instruct the witness not to answer." (pp. 27, 28)

280 "Q. Now, Mr. Thompson, following the recess of the mediation would not not be correct to assume that this means that Mr. Newlin's efforts had not succeeded in bringing about an agreement.

"Mr. Shapiro: I object to the question. It calls for a conclusion on the part of the witness concerning the Board's conclusions as to the matters that have been submitted to it." (p. 28)

11. "Q. You have stated earlier that these reports of the mediators come to you and that you see them and that you had seen Mr. Newlin's report.

"Now, did Mr. Newlin state in his report that he had not been able to bring about an agreement of the parties?

"Mr. Shapiro: Objection. The contents of the mediator's report are privileged and I instruct the witness not to answer." (p. 28)

12. "Q. Mr. Thompson, did Mr. Newlin indicate that he had not—that he had, rather, been able to bring about agreement of the parties?

"Mr. Shapiro: Objection. The contents of the mediator's report are privileged and I instruct the witness not to answer." pp. 28, 29)

13. "Q. Now, Mr. Thompson, what is the practice of the Board with respect to the time it holds a case without taking action on it?

281 "Mr. Shapiro: I am going to object to that question on the ground that it calls for a generalized

conclusion as to which Mr. Thompson is not qualified to make." (p. 29)

14. "Q. Isn't it true, Mr. Thompson, that the action of the Board with respect to Florida East Coast, in refusing and failing to take any or make any effort to assign mediators to complete its duties under the Act, are different than the practices customarily followed with respect to other requests for the services of the Board?

"Mr. Shapiro: Objection. It calls for a characterization of the mediation in the Florida East Coast case and a characterization of the mediation in other cases which relate to the practice of the Board in conducting mediation and is considered privileged." (p. 29)

15. "Q. Now, Mr. Thompson, as the attorneys for Florida East Coast we claim no privilege on the part of Florida East Coast to any of the questions that you have been previously asked.

"And I ask you again why has the Mediation Board refused, in the case of the Florida East Coast, to proceed with its duties under the Act to assign mediators and, once mediators are assigned, to proceed with mediation as the duties are imposed upon them by the Act?

"Mr. Shapiro: I object to the question on the ground that it relates to the Board's grounds and reasons and deliberations in conducting mediations.

282 "And I instruct the witness not to answer on the ground that these matters are privileged." (p. 30)

16. "Q. Now, even though you don't recall whether this was said, Mr. Thompson, is there now a policy in the Mediation Board that it will not assign mediators in cases which involve litigation?

"Mr. Shapiro: I object to the question. It relates to the mediation practices of the Board and is regarded as privileged, and I instruct the witness not to answer." (p. 36)

17. "Q. Mr. Thompson, is it the policy of the Board, so far as you have been instructed or know, not to assign a mediator in a case in which you believe no results would be accomplished?"

"Mr. Shapiro: Again I object to the question on the ground that it deals with the manner in which the Board assigns cases for mediation.

"I consider this matter to be privileged." (pp. 38, 39)

The foregoing information is relevant and material and essential to the defense of this action and the information requested is not subject to any proper or recognized claim of privilege.

WHEREFORE, defendant respectfully moves, pursuant to Rule 37(a) of the Federal Rules of Civil Procedure 283 for an Order requiring deponent to answer each of the foregoing questions.

Respectfully submitted,

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Filed May 27, 1964

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 64-107 Civ. J.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

FLORIDA EAST COAST RAILWAY COMPANY, *Defendant*.

Motion for Production of Documents

Pursuant to Rule 34 of the Federal Rules of Civil Procedure defendant, Florida East Coast Railway Company, moves the Court for an Order requiring plaintiff, The United States of America, to produce and to permit defendant to inspect and to copy the following documents:

1. All letters and correspondence from January 23, 1963, from the organizations listed in plaintiff's Exhibits A, B and C attached to the complaint or from the international unions with which the said organizations are affiliated or associated, or from other unions of the AFL-CIO to the Department of Justice of the United States, to the National Mediation Board or to any other department, office or agency of the United States relating to the strike against defendant, and/or issues discussed in the complaint filed herein by the United States of America, and all
285 correspondence from the Department of Justice of the United States, the National Mediation Board or from any other department, office or agency of the United States to the above-mentioned organizations relating to the strike.

2. All minutes, notes or other memoranda of conferences, either in person or by telephone, from January 23, 1963,

between the Department of Justice of the United States, the National Mediation Board and any other department, office or agency of the United States and the organizations named in Paragraph 1 above, relating to the strike against defendant or any issue discussed in the complaint filed herein;

3. Minutes of all Executive Meetings of the National Mediation Board from January 1, 1963 to date, dealing with Florida East Coast Railway Company;

4. All reports of mediators from January 1, 1963 to date, dealing with Florida East Coast Railway Company.

Plaintiff, the United States of America, has custody and control of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Civil No. 64-107-Civ.J.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

FLORIDA EAST COAST RAILWAY COMPANY, *Defendant*.

STATE OF FLORIDA }
COUNTY OF DUVAL } ss.

R. W. WYCKOFF, Vice President and Director of Personnel of Florida East Coast Railway Company, being first duly sworn, says:

Plaintiff has the possession, custody or control of the documents listed in the Motion for Production of Documents herein.

All of said documents relate either to the labor dispute between defendant and the unions listed in plaintiff's
287 Exhibits A, B and C attached to the complaint herein, which dispute gave rise to and is the subject of the complaint, or to the relationship between plaintiff and the organizations listed in plaintiff's Exhibits A, B and C attached to the complaint herein, or to action by the plaintiff with respect to matters involved in this litigation. All of said documents are relevant to this case since their inspection is necessary to determine the legal merit of the position adopted by the labor unions in their dispute

with defendant, which position is also espoused by plaintiff in its complaint herein.

R. W. WYCKOFF

R. W. Wyckoff

*Vice President and Director of Personnel
Florida East Coast Railway Company*

SWORN TO AND SUBSCRIBED before me, a Notary Public, this 27th day of May, 1964.

BLANCHE B. REEVES

Notary Public, State of Florida at Large

My commission expires: May 7, 1968

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Filed May 27, 1964

Motion to Quash Subpoenas Duces Tecum

COME NOW, R. M. Cooke, General Chairman, Brotherhood of Railway Carmen of America; O. C. Jones, Vice President, The Order of Railroad Telegraphers; Frank Jackson, System Chairman, Dining Car Employees' Union, Local 351; R. L. Lanier, General Chairman, Sheet Metal Workers International Association; R. W. McDougall, General Chairman, International Association of Machinists; C. S. Kerr, District Chairman, The American Railway Supervisors Association, Lodge No. 591; C. J. Robbins, General Chairman, American Train Dispatchers Association; C. A. Dupont, General Chairman, International Brotherhood of Electrical Workers; I. S. Allen, Local Chairman, Brotherhood of Railway Carmen of America; R. G. Smith, Vice President, The Brotherhood of Railway Carmen of America; W. F. Howard, General Chairman, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; C. L. Winstead, General Chairman, Brotherhood of Maintenance of Way Employees; I. E. Hamilton, General Chairman, The

Order of Railroad Telegraphers; J. C. Ricard, The Order of Railroad Telegraphers, and J. E. Dubberly, The Brotherhood of Railway Signalmen, and any other non-operating union officials served with the same subpoena duces tecum as the one served upon the above named officials, and move the Court to quash these subpoenas duces tecum and for grounds would show:

289 1. The subpoenas duces tecum request no specific documents but rather are a printed form which if literally complied with would require the production at great expense of vast amounts of papers and correspondence, all of which have no relevancy or materiality to the issues in the pending cause. The subpoenas, by requesting merely broad categories of documents, amounting to virtually the entire files of the non-operating brotherhoods in Florida, are obviously a mere fishing expedition rather than the request for relevant and material evidence.

2. None of the matters which the defendants seeks to have produced are relevant or material to this cause.

3. This subpoena duces tecum on its face is for the purpose of harassment only and is impossible of compliance.

4. Pursuant to the Federal Rules of Civil Procedure the defendant must show due and good cause for the production of documents which the defendant has here failed to do.

Respectfully submitted,

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Filed September 24, 1964

Supplemental Memorandum for the United States**INTRODUCTION**

This memorandum discusses the effect of the decision in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen, AFL-CIO*, C.A. 5 No. 21356, decided August 18, 1964, upon the instant proceeding.¹ It is the plaintiff's contention here that the Court of Appeals decision fully supports its claim for injunctive relief to vindicate the processes of the Railway Labor Act.

I. A SUMMARY OF THE ACTION

The complaint in this action is addressed to three departures from the requirements of the Railway Labor Act by defendant. Court I concerned a Uniform Working Agreement proposed by FEC on September 24, 1963, which comprehensively revised and superseded all previous collective bargaining agreements for defendant's non-operating crafts or classes and the International Association of Railway Employees. These changes were placed into effect on October 30, 1963, notwithstanding the fact that the labor organizations had made a timely invocation of the services of the National Mediation Board and that the parties were therefore required to maintain the status quo under Section 6 of the Railway Labor Act, 45 U.S.C. 156.

Count II concerned defendant's proposal of July 31, 1963, to cancel the union shop agreements of 18 labor organizations. Notwithstanding the timely invocation of the services of the National Mediation Board by the labor

¹ For a fuller statement of the Government's contentions, the Court is respectfully referred to plaintiff's memorandum in support of its motion for preliminary injunction previously filed herein, and to the arguments in the transcript of proceedings before this Court May 26-28, 1964, particularly pages 27-59 and pages 572-597.

organizations involved, defendant has, since October 15, 1963, treated the union shop agreements as cancelled.

Count III was concerned with temporary working conditions announced on September 1, 1963, for all operating and non-operating employees of the carrier. The conditions were never the subject of procedures under the Railway Labor Act.

The United States prayed for an injunction against continuation of the allegedly illegal changes represented by the uniform working agreements of September 24, 1963, the union shop cancellation proposal of July 31, 1963, and the "conditions of employment" of September 1, 1963.

On May 26, 1964, Florida East Coast filed its answer. It admitted that it had put into effect its uniform working agreement of September 24, 1963, and the union shop cancellation proposed of July 31, 1963. It alleged however that its "conditions of employment" of September 1, 1963, were no longer in effect for any craft or class of its employees.

The matter came on for hearing on the plaintiff's motion for preliminary injunction before this Court on
293 May 26, 1964. The hearing continued until the afternoon of May 28, 1964.²

During the hearing it was established by the admissions of defendant's counsel (Tr. 55a-57) and by the testimony of R. W. Wycoff, defendant's Vice President and Director of Personnel (Tr. 77) that Florida East Coast is no longer operating under its temporary "conditions of employment" of September 1, 1963. Its operating personnel are presently said to be working under the collective bargaining agreements with the labor organizations representing them, as

² In the discussion which follows the transcript of proceedings will be referred to as (Tr.; and the decision of the Court of Appeals in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen* will be referred to as (C.A. 5 dec.)).

amended by proposals of November 2, 1959, which the carrier has put into effect (Tr. 97, 98). Its non-operating personnel, are working under the Uniform Working Agreement of September 24, 1963 (Tr. 97, 154).

II. THE DECISION OF THE COURT OF APPEALS.

The decision of the Court of Appeals makes clear several things:

First, a dispute of this kind is a major dispute subject to the procedures of Section 6 of the Railway Labor Act, 45 U.S.C. 156; not a minor dispute to be referred to the National Railway Adjustment Board (C.A. 5 dec., p. 10).

Second, the institution of wholesale changes of the sort here involved, in violation of the Railway Labor Act, are enjoined pending exhaustion of the procedures of the Act (C.A. 5 dec., p. 12). The Norris-LaGuardia Act, 29 U.S.C. Section 101 et seq., is inapplicable and does not withdraw jurisdiction from this Court to enforce the mandate of the Act (C.A. 5 dec., p. 12, Fn. 23).

294 *Third*, the abrogation of the union shop agreement proposed on July 31, 1963, and implemented on October 30, 1963, without awaiting exhaustion of the procedures of the Act is illegal and enjoined. This Court's ruling to this effect in *Brotherhood of Railroad Trainmen v. Florida East Coast Railway Company*, No. 64-40-Civ-J, decided March 2, 1964, was fully affirmed (C.A. 5 dec., p. 19). The Court of Appeals also held that this Court was correct in its ruling that the uniform working agreement for operating employees, proposed on September 25, 1963, could not be put into effect until the procedures of the Act were exhausted (C.A. 5 dec., p. 19). *A fortiori*, the uniform working agreement of September 24, 1963, for non-operating employees has also been illegally put into effect and should similarly be enjoined pending exhaustion of the processes of the Act.

Fourth, whether the labor organizations are on strike or not is irrelevant to their status as the bargaining representative for all employees in the crafts or classes covered by their agreements, even if these employees are not union members; and their collective bargaining agreements remain in full force and effect. The argument that the agreements are suspended during the period of a strike "has no merit." (C.A. 5 dec., p. 14).

Fifth, the carrier has the right to hire new employees and to operate during a strike. But it must do this in accordance with the terms of the existing collective bargaining agreements except to the extent that departures from those agreements are reasonably necessary "to make a meaningful reality of FEC's right to continue to operate . . ." (C.A. 5 dec., p. 18). In an action in which the legality of such departures are challenged under the Railway Labor Act, such as this case and *Brotherhood of Railroad Trainmen v. Florida East Coast Railway Company*, *supra*, the District Court must be convinced as to the necessity of what the carrier has done or proposes to do (C.A. 5 dec., p. 18).

Each particular departure from the lawful agreements must be fully justified by the carrier as being "reasonably necessary". And the "reasonable necessity" to which the Court of Appeals refers is not to be measured by mechanical factors such as comparative levels of pre-strike and post-strike operations, or by financial considerations. No single factor is controlling. Rather, the Court must look to the totality of circumstances surrounding the particular departure from the collective bargaining agreement which the carrier alleges to be necessary, and to relate them to the carrier's right to continue to operate. Thus, the efforts by the carrier to comply with its collective bargaining agreements, the time it has had to restore operations, its good faith in departing from the agreement, the possibilities for recruitment of replacements, in

short, the entire history of the dispute, are to be considered. The carrier has a right to continue to operate, but that right cannot be exploited as an occasion for wholesale escape from collective bargaining agreements which are lawfully in effect. If a carrier creates difficulties for itself by such attempts, it cannot contend that the situation created by its own refusal to comply with the agreements constitutes "reasonable necessity" for departure from them.³

296 III. THE EFFECT OF THE COURT OF APPEALS'
DECISION UPON THIS CASE.

A. *The Uniform Working Agreement and the
Union Shop Abrogation.*

The record in this case establishes that the United States is entitled to an immediate injunction. The union shop abrogation of July 31, 1963, and the Uniform Working Agreement of September 24, 1963, both implemented by the carrier despite timely invocation of the services of the National Mediation Board, are violations of 45 U.S.C. 156 as construed by the Court of Appeals and should be enjoined forthwith, pending completion of the mediation process. That process can begin when the statutory condition of stability intended by 45 U.S.C. 156 is restored.

B. *The Conditions of Employment.*

An injunction must also issue to prevent reversion by the carrier to its Conditions of Employment or any other

³ The foregoing discussion is based upon plaintiff's recognition that the decision of the Court of Appeals constitutes a controlling precedent in this Court. It is the Government's position, however, that this Court's original decision in *Brotherhood of Railroad Trainmen v. Florida East Coast Railway Company*, was correct in holding that a carrier is not permitted to deviate from the terms of its collective bargaining agreements in any significant respect during the period of a strike, except as expressly authorized by the Railway Labor Act. The Act does not provide for the exception recognized by the Court of Appeals. The Government adheres to this position in this case.

wholesale departure from the terms of its collective bargaining agreement. Mr. Wycoff testified that in the event the Uniform Working Agreement were to be enjoined, the carrier would revert to the Conditions of Employment of September 1, 1963 (Tr. 165, 167). Since these conditions are substantially similar to the Uniform Working Agreement (Tr. 144, 156-162), the carrier would, in effect, continue to operate as before, and thus frustrate this Court's decree. Such wholesale departures from the terms of the collective bargaining agreements lawfully in force are expressly condemned in the Court of Appeals' decision. Only if the Court is convinced that a *particular* departure is reasonably necessary to the exercise of the carrier's right of self-help may it be authorized. Thus, the threatened wholesale reversion must also be enjoined.

C. Particular Departures from the Collective Bargaining Agreements.

The remaining question to be discussed is whether any particular departures from the collective bargaining
 297 agreements are reasonably necessary at the present time, in the light of the facts and circumstances of this case. Plaintiff submits: (1) the record as it stands shows that the carrier cannot justify any departures from the agreements; (2) no further hearing is necessary for the consideration of proposed departures; but (3) if the court is convinced that a further hearing is necessary, that it should issue a preliminary injunction requiring the carrier to adhere to the lawful agreements until the Court has authorized particular departures sought by the carrier. The remainder of this discussion will be addressed to the first proposition.

A review of the testimony of Mr. Wycoff (Tr. 76-250) and of Mr. Winfred L. Thornton, President of the Florida East Coast Railway Company (Tr. 256-295), clearly establishes that there is at present no necessity for a departure

from the collective bargaining agreements lawfully in force.. In sum, the evidence establishes that the carrier never made a genuine effort to comply with the collective bargaining agreements. The strike has been on for over twenty-one months. But for its own conduct FEC could by now have substantially complied with the agreements while still exercising its right to operate. Its wholesale revisions of job classifications, wages, work day, hours, seniority, safety, discipline, vacations were the product of a program to rid itself of agreed conditions which it considered onerous,⁴ rather than a product of the emergency.

When the strike began, FEC thought so little of its own counter-proposals to the non-operating unions that it never implemented them (Tr. 190), although it acquired this right of self-help when the processes of the Act were exhausted. *Brotherhood of Locomotive Engineers v. Baltimore & Ohio RR. Co.*, 372 U.S. 284. Instead, it immediately embarked on a new long range personnel program. On September 1, 1963, the carrier codified the most important part of that program—rates of pay, rules and working conditions—into its "Conditions of Employment". Each of its employees were required to accept these conditions as their exclusive individual working agreement, notwithstanding the fact that the collective bargaining agreements for their crafts or classes were still in effect and were still unmodified (Tr. 102-114; Pl. Exh. 4A).

The carrier's long range personnel program was described in detail in the testimony of Mr. Thornton in the hearing before the Joint Federal Inquiry Board under the chairmanship of the Department of Labor with the Department of Defense and National Aeronautics and Space Agency participating, dated October 1, 1963 (Tr. 233, 237). By that time the program had been developing

⁴ The carrier's right to do this is not questioned, of course, so long as it is done in accordance with the requirements of the Railway Labor Act.

for ten months. Even though the former collective bargaining agreements were still in effect and had not been modified under the Act, Mr. Thornton was able to testify that the carrier was operating with almost full manpower requirements (Tr. 276). It is also significant that three weeks after the Conditions of Employment were codified it proposed its Uniform Working Agreements for both operating and non-operating personnel. These were simply the Conditions of Employment with a preamble and certain minor additions (Tr. 144, 156-162, 241).

The long range program and the history of the Conditions of Employment, plus Mr. Thornton's testimony show that the carriers real objective was to profit from the strike situation by shaking itself free of the collective bargaining agreements with which it was dissatisfied. They show also that it never really made any effort to
 299 comply with those agreements while they were legally in force. It had no difficulty in recruiting personnel (Tr. 242-243); and within ten months it was able to recruit and train a workforce in excess of 650 employees which was able to handle 95% of the freight volume handled before the strike (Tr. 230, 234). In the period since October 1963, there is no reason why, if it had so desired, it could not have expanded its work force at the same rate. Only its illegal implementation of its Uniform Working Agreement explains its failure to do so.

The carrier's refusal to make any genuine effort to comply with the agreements is further demonstrated by the carriers complete lack of candor with respect to the changes in its operating agreements. On November 4, 1963, it purported to put into effect a Uniform Working Agreement for its operating personnel. Many of the provisions in this agreement were concerned with the same subject matter as the carriers notice of November 2, 1959. Under Public Law 88-108 it was prohibited from changing the rates of pay, rules and working conditions which had

been the subject of the November 1959 notice. In an action by the United States to compel compliance with the provisions of Public Law 88-108 (*United States v. Florida East Coast Railway Company*, D.C.M.D. Fla., No. 63-260-Civ-J), this Court directed the carriers to comply with the provisions of the statute by withdrawing its changes. In fact, however, the carrier continued to operate under its "Conditions of Employment", which were substantially the same as the uniform working agreement which had been enjoined (Tr. 126, 127). It is plain from the testimony of Mr. Wycoff that the carrier made no effort to comply with the collective bargaining agreements in force, but simply carried on as before under the Conditions of Employment which were substantially the same as the enjoined provisions of the working agreement. (Tr. 104, 128, 206).

300 It is also significant that although the carrier insisted that its Conditions of Employment were the result of the emergency created by the strike, nowhere in the conditions or in the document which the carrier required all employees to sign acknowledging submission to the "Conditions of Employment" (Pl. Exh. 4A), was there any reference to an emergency or any indication that the conditions were temporary. (Tr. 125-126).

Note must also be taken of the carrier's desperate maneuvering after this Court's decision in *Brotherhood of Railroad Trainmen v. Florida East Coast Railway Company*, as reflected in plaintiff's exhibits numbers 5, 6 and 7. These exhibits and Mr. Wycoff's testimony (Tr. 128-141) further reflect the carrier's tortured and often confusing efforts to escape the requirements of the collective bargaining agreements which were unsatisfactory to it.

This carrier has had more than enough time to build a staff which can operate its own equipment, to the extent it wishes to operate, in accordance with the terms of the collective bargaining agreement legally in force. More than 21 months have expired since the beginning of the

strike. The carrier's attempts to impose its presently illegal Uniform Working Agreement, and to mask its "Conditions of Employment" behind its fictional assertion that the permanent agreements are "in effect" (Wycoff *passim*) and the long range program it implemented as soon as it started to operate (Tr. 266), are the basic cause of any difficulties it may now face from any shortage of trained personnel. It claims to be operating near full freight capacity (Tr. 230, 232), and to have a permanent personnel program (Tr. 234). It does not at present face an operating emergency (Tr. 143), but rather, is handling all of the freight traffic that is presented to it. 301 (Tr. 272). And the carrier's own officers have testified that compliance with the agreements would still permit operations at around 50% of pre-strike capacity (Tr. 216, 264). "Reasonable necessity" certainly does not constitute a guarantee of return to pre-strike conditions. In view of this carrier's conduct and the peculiar history of the labor disputes on its property since January 1963, even if some reduction in service might temporarily result from compliance with the law, this is plainly not the kind of situation which would be "reasonably necessary" grounds for departure from the existing agreements within the meaning of the Court of Appeals decision.

CONCLUSION

Under the Court of Appeals decision the implementations of the uniform working agreement of September 24, 1963, and the union shop abrogation proposal of July 31, 1963, are plainly illegal and should be enjoined forthwith. The carrier should also be enjoined from reverting in any respect to the conditions of employment of September 1, 1963, or any other conditions departing from the collective bargaining agreements. A decree should issue requiring it to comply with the terms of its existing collective bargaining agreements unless and until these agreements are

changed in accordance with the procedures of the Railway Labor Act.

Respectfully submitted,

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September 1964

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Filed September 24, 1964

Memorandum of Defendant, Florida East Coast Railway Co.

This memorandum is submitted pursuant to the request of the Court as contained in the letter of September 1, 1964, from John W. Douglas, Assistant Attorney General, Civil Division, by Harland F. Leathers, Chief, General Litigation Section. It is our understanding of the request, that the Court desires from each party a memorandum setting forth its views of the effect of the decision of the United States Court of Appeals for the Fifth Circuit, in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, on this case and, we assume, our

respective suggestions as to further proceedings in this case.

I. INTRODUCTION

The decision of the United States Court of Appeals for the Fifth Circuit on August 18, 1964, in *Florida East Coast Railway Company v. Brotherhood of Railroad Trainmen*, No. 21356, affirmed in part and reversed and remanded in part the injunction issued by the United States District Court in *Brotherhood of Railroad Trainmen v. Florida East Coast Railway Company*, No. 64-40-Civ. J. Without attempting to set forth a detailed resume of that decision, with which the Court and the parties are already familiar, it will be helpful to note the basic points which we deem to be controlling here.

303 1. That the dispute was a major dispute.¹

2. That in the absence of strike conditions, institution of "wholesale changes of the sort here involved would be enjoined by the District Court pending exhaustion of the procedures of the Act,"² and even in the presence of strike conditions, which gave Florida East Coast³ the unquestioned right to resort to self-help,⁴ FEC may not engage in wholesale abrogation of the agreement.⁵

3. That the Brotherhood of Railroad Trainmen⁶ is still the bargaining representative of all the employees in the crafts of trainmen and yardmen, whether union members or not, and the employees of FEC are entitled to the benefit of the terms of the (BRT) agreement, which may not be

¹ Slip opinion, p. 10.

² Hereinafter, also referred to as FEC.

³ Slip opinion, p. 12.

⁴ Slip opinion, pp. 14-15, 17.

⁵ Slip opinion, p. 17.

⁶ Hereinafter, also referred to as BRT.

superseded by individual contracts, whether consented to by the employees or not.⁷

4. That FEC may not institute the changes in rates of pay, rules and working conditions contained in its Section 6 notices of July 31 and September 25, 1963, until the statutory procedures are exhausted.⁸

5. That there is an actual strike against FEC by the non-operating unions, the continuation of which is legal, as is the effort of FEC to operate.⁹

6. That it is not a violation of the (BRT) agreement or the Railway Labor Act, for FEC to hire and pay non-union replacements, and at the conclusion of the strike such replacements need not be discharged or displaced to make way for returning strikers.¹⁰

7. That FEC has no obligation to fire any replacement, at least, until union membership has been declined by him.¹¹

8. That the FEC's right of self-help means help which is reasonably needed to meet the impasse of a railroad desiring to run and unions unwilling to furnish workers.¹²

9. That the November 2, 1959, notice was not superseded by the September 25, 1963, notice and FEC is free to operate under the 1949 collective bargaining agreement as amended by the November 2, 1959, notice.¹³

304 10. That FEC may, in addition, institute and maintain such employment practices, etc. as are, and

⁷ Slip opinion, p. 14.

⁸ Slip opinion, p. 19.

⁹ Slip opinion, p. 14.

¹⁰ Slip opinion, pp. 16-17.

¹¹ Slip opinion, p. 17.

¹² Slip opinion, p. 17.

¹³ Slip opinion, pp. 18-19.

continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions.¹⁴

II. FLORIDA EAST COAST RENEWS ITS PRIOR MOTION TO DISMISS THE COMPLAINT OF THE UNITED STATES AND OF INTERVENORS.

The grounds urged in support of FEC's motion to dismiss are incorporated herein by reference and need not be repeated.

The decision of the Circuit Court of Appeals in the *Trainmen* case further supports FEC's prior contentions to the effect that the United States lacks standing to bring this action, that there is no "case or controversy" existing between the United States and FEC, and that the United States is not the real party in interest. As the Court has recognized, the dismissal of the complaint of the United States will also require the dismissal of the complaint of the intervenors (Tr. 60).

The decision of the Court of Appeals makes it plain that, while FEC may not place into effect the changes proposed in its July 31, 1963, or September 24, 1963, Section 6 notices until the procedures of the Act have been completed, FEC is free to institute and maintain such employment practices as are reasonably necessary to the effectuation of its right to operate its railroad under strike conditions. Consequently, this decision of the Court of Appeals destroys entirely the primary basis asserted by the United States for its standing to sue. Thus, the theory of the United States was that FEC's operation under strike imposed conditions was illegal because FEC had not complied with the requirements of the Railway Labor Act to change existing agreements and by these illegal acts caused a continuing strike which carries with it disruption to interstate commerce and the United States thereby

¹⁴ Slip opinion, pp. 19-20.

claimed the right to prevent activity which imperils its free flow of commerce.¹⁵ But the Court of Appeals held that there was an actual strike by the non-operating unions in support of their wage demand after all procedures of the Act had been exhausted;¹⁶ that FEC had the unquestioned right to resort to self-help; and that self-help means the right to institute and maintain such employment conditions as are reasonably necessary to
 305 permit it to operate under strike conditions. As previously pointed out, and as emphasized by the decision of the Court of Appeals, there is no basis in fact for the contention that there is any interruption to commerce or that any interruption to commerce can be reasonably anticipated so as to give the United States standing to maintain this action. Nor is there any basis to sustain the assertion of standing on the theory that the United States seeks to protect the jurisdiction of the National Mediation Board. In the first place, plaintiff (United States) contended that, "The evils which would flow from permitting resort to 'temporary' conditions during a strike . . ."¹⁷ requires that the United States protect the jurisdiction of the Mediation Board in order to prevent the institution of changes in conditions of employment during the strike period.¹⁸ This argument is, of course, entirely overturned by the decision of the Court of Appeals that FEC is free to:

" . . . institute and maintain such employment practices, etc., as are, and continue to be, reasonably necessary to effectuate its right to run the railroad under the strike conditions."¹⁹

¹⁵ Memorandum in Support of Motion of the United States for Preliminary Injunction (Hereinafter referred to as Memorandum) pp. 20-22.

¹⁶ Slip opinion, p. 4.

¹⁷ Memorandum, p. 17.

¹⁸ Complaint pp. 6-10, Memorandum pp. 16-20.

¹⁹ Slip opinion, pp. 19, 20.

Moreover, the argument stressing the urgent need felt by the government to protect the Railway Labor Act from wholesale violation is also shown to be a fiction.

In the second place, as the record shows, FEC has never refused to comply with the mediatory processes of the Railway Labor Act. To the contrary, FEC has, for example, repeatedly stated its willingness to mediate its notices of July 31 and September 24, 1963, notwithstanding the fact that it was the Carrier's position that these rules changes had been properly placed into effect. As the record also demonstrates, it was the Mediation Board, not FEC, who failed to fulfill its duty under the Act by failing and refusing to mediate; by failing and refusing to assign mediators; by discriminating in the assigning of mediators whereby it assigned mediators in some cases recently docketed and failed and refused to assign mediators in cases docketed many months earlier. (Tr. 306, 307, 339, 356-358, 495, 496, 497, 498, 499, Def. Exh. T (for identification)).

306 III. IF COMPLAINTS OF PLAINTIFF AND INTERVENORS
ARE NOT DISMISSED, THE COURT MAY DISPOSE OF
THE CASE BY ORDER AND WITHOUT FURTHER
HEARING

The Complaint of the United States prays for the following permanent injunctive relief: FEC is to be restrained from

- (1) In any manner continuing in effect of implementing the changes contained in its July 31 and September 24 notices except by agreement with the Unions or until the National Mediation Board acts upon said notices;²⁰
- (2) making any other changes except in accordance with Section 6 of the Act;²¹

²⁰ Complaint, p. 10, item 1 (a).

²¹ Id., item 1 (b).

- (3) continuing in effect or taking any action under the "Conditions of Employment" except by agreement with the Unions;²²
- (4) making any other changes affecting its employes as a class except in accordance with Section 6 of the Act.²³
- (5) making individual agreements with employees except in accordance with the collective bargaining agreement for that class of employees.²⁴
- (6) to revoke all notices and actions placing into effect the changes proposed in the July 31, 1963, and September 24, 1964, notices and in the "Conditions of Employment";²⁵
- (7) to bargain in good faith with the Unions.²⁶

Defendant, FEC, raised various defenses, most of which have been decided by the Court of Appeals, as will be discussed hereinafter. The major questions raised by Defendant and left undecided are:

- (a) Refusal of Unions to bargain;
- (b) Refusal of National Mediation Board to carry out its duty under the Act, including prompt assignment of mediators; performance of its mediatory services; and prompt release of disputes when mediatory efforts have failed;
- (c) Discrimination by Unions against replacements which has rendered Union Shop Agreement void and unenforceable as to such employees.

²² Ibid., p. 11, item 2 (a).

²³ Id., item 2 (b).

²⁴ Id., item 2 (c).

²⁵ Id., item 3 (a).

²⁶ Id., item 3 (b).

307 Each of plaintiff's prayers for relief has already been decided by the Court of Appeals in the *Trainmen* case; consequently, there is no need for further hearing. Both the relief prayed for by Plaintiff and the defenses raised by Defendant can, and we submit should, be disposed of by ex parte orders. Thus, item (1) relates to the July 31 and September 24, 1963, notices. The Court of Appeals has rendered FEC's action in placing the rules changes contained in these notices into legal effect as amendments to prior agreements a nullity. Actually no further order is required to achieve the nullification of these actions since they are legal nullities by virtue of the decision of the Court of Appeals. Moreover, FEC is prepared to so notify the Unions that its notices placing these rules into effect are withdrawn. While an order is not required, FEC does not object to such an order if the Court deems it is necessary.

The second part of item (1) relates to the completion of the statutory procedures before placing the rules changes contained therein into effect. Item (7) and Defendant's points (A) and (B) must be considered together. The Court of Appeals has already decided that FEC may not place into effect its July 31 or September 25 (September 24 to non-ops) Section 6 notices into effect until the procedures of the Act have been completed. With this FEC has not the slightest quarrel and is fully prepared with or without further order in this case to comply fully with the spirit and intent of the Circuit Court's decision. However, the record in this case shows beyond any doubt a blatant violation of obligation—not by FEC—but rather by the Unions in flatly refusing to bargain and by the Mediation Board in failing and refusing to perform its statutory duties. The United States has loudly proclaimed that good faith bargaining is not required, a position which was adopted by the intervenors. The Court of Appeals has, in effect, held that good faith is not required to justify

a refusal to bargain, provided only that the services of the Mediation Board are requested within 10 days.

Counsel for the United States has made two very significant admissions. First, he left no doubt that the Mediation Board has not carried out its mediatory duties. He states,

308 "Now, the fact of the matter is and the record will show that, as to the particular rules changes we are involved with here, the Mediation Board has not sent a Mediator. (See, Def's Exh. T for identification) That's plain; we don't deny it." (Tr. 339)

Second he states:

"If the injunction is granted, the Court may very well condition it on some requirement that the Mediation Board promptly undertake mediation. I think that's within your equitable discretion and I dare say the Board would be more than willing to try once the statutory condition, the statutory atmosphere, is restored." (Tr. 326)

We believe the proper solution to this problem is simply to provide by order that FEC be enjoined from placing such rules into effect until the procedures of the Act are completed and that the National Mediation Board is directed to promptly undertake mediation in all docketed FEC cases and if such efforts of the Board to bring about an amicable settlement through mediation should be unsuccessful, the Board is directed at once to endeavor to induce the parties to submit their controversy to arbitration and if arbitration is refused by one or both parties, the Board shall at once notify the parties in writing that its mediatory efforts have failed and for 30 days thereafter, unless in this intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of the Act, no change will be made in the rates

of pay, rules or working condition or established practices in effect prior to the time the dispute arose.

As the Court will note, the portion directed against the National Mediation Board is largely a direct quote from the statute and the entire provision is wholly in accord with the provisions of Section 5, First of the Act. Why then, is it necessary to restate this duty? Simply because the Mediation Board has failed to fulfill its statutory duty and it is, in effect, the party plaintiff or perhaps more technically correct this action is brought on behalf of and for the benefit of the Mediation Board. Plaintiff has already stated that it has no objection to such an order and this would avoid any necessity of having to resolve other difficult questions. It is also fully in keeping with the statutory obligation as to FEC and the Unions, and fully in accord with the decision of the Court of Appeals.

309 Items (2), (3), (4) and (5) have been disposed of by the decision of the Court of Appeals. As has already been pointed out, the Court held that FEC is required to operate under the 1949 BRT agreement as amended by the November 2, 1959, notice, except that it may institute and maintain such employment practices, etc., as are reasonably necessary to effectuate its right to continue to run its railroad under strike conditions. We believe this is fully applicable here and the Court may so order.

Although we recognize that the Court of Appeals has stated that it falls to the lot of the District Judge to pass on what changes are in fact necessary in order for FEC to continue to operate,²⁷ we do not believe such a hearing would be appropriate at this time. FEC will immediately undertake to conform its operations so as to comply with each agreement except to the extent employment conditions,

²⁷ Slip opinion, p. 18, 20.

etc., differing therefrom are necessary to permit the continued operation of the carrier under strike conditions. 17 organizations are covered by the Complaint,²⁸ and there are at least 13 individual collective bargaining agreements involved, together with many thousands of interpretations by the Adjustment Board (about 40,000) as well as numerous interpretations by various national disputes councils, etc. To bring its operations into compliance with these various agreements, as interpreted and applied to the extent possible under strike conditions will present a very considerable problem. Certainly, the obligation to comply with the order of the Court in this regard is the Carrier's. We do not delude ourselves that the Unions will agree on all, or any, deviations that are reasonably necessary to permit Defendant to continue to operate under strike conditions, but the only orderly way to proceed, we submit, is for the Carrier to bring its operations into compliance with the Court's order and then if there are disputes it will be soon enough for the Court to decide them as directed by the decision of the Court of Appeals. For the Court to attempt to decide these questions in advance would be an unwarranted burden on the Court and might prove to be an exercise in futility. To comply with such order, 310 will require a reasonable period of time—there are some things that can be done quickly and Defendant proposes to do them quickly; but to represent that Defendant could fully conform all operations to prior agreements, except to the extent that employment conditions differing therefrom are reasonably necessary to permit the continued operation of the railroad under strike conditions, immediately upon issuance of an order would be totally unrealistic. Neither operations under strike conditions nor strike conditions themselves are static. For example, the Brotherhood of Locomotive Engineers formally went on strike on or about the 16th of September; the recent hurri-

²⁸ United Transport Service Employees (Red Caps and Porters) has been listed twice.

canes presented special problems affecting operations under strike conditions; the highly seasonal nature of Defendant's traffic also cause different problems of operating under strike conditions at different times of the year; and various acts of sabotage and harassment have presented other operating problems under strike conditions. Nevertheless, a reasonable time as to any particular matter is a standard which the Court can effectively enforce.

As to item (6), this likewise has been disposed of by the decision of the Court of Appeals and is covered by our comments with respect to items (2), (3), (4) and (5). Suffice to say, the Conditions of Employment are not now in effect and the order, as discussed above will fully cover this matter.

The final question is Point C, Discrimination by the Unions which has rendered their Union Shop Agreements null and void and unenforceable. This question was not decided by the Court of Appeals but was disposed of by the Court imposing the limitation that FEC shall not be required to discharge any replacement under the Union Shop Agreement, at least, until the employee has been offered membership and has declined to join. We submit that this is the most practical solution to the problem, and, without having to decide whether, as we believe very clearly is the case, discrimination renders such Union Shop Agreements void and unenforceable, discrimination is avoided, a direct violation of the statute is avoided, and the Unions are, in reality, required to do only what the statute requires.

Defendant respectfully submits that the Complaints herein should be dismissed. In the event the Complaints are not dismissed, defendant further respectfully submits that this case should be disposed by order without further hearings at this time. Defendant's views as to the lan-

guage of such order are reflected in the proposed order attached hereto.

Respectfully submitted,

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24 September 1964

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INJUNCTION

This matter came on to be heard on the 26, 27 and 28 of May, 1964, on the Complaint of the United States of America, the exhibits attached thereto, the motion of the plaintiff for a preliminary injunction, and each of the parties being represented by counsel and the Court having received testimony and documentary evidence, and having considered memoranda and briefs of counsel and having heard argument of counsel, it is

ORDERED, ADJUDGED AND DECREED:

1. That the defendant, Florida East Coast Railway Company (hereinafter also referred to as "defendant" or "FEC"), its officers, agents, servants, employees and attorneys and all persons in active concert or participating with them are restrained and enjoined from instituting

change in rates of pay, rules and working conditions contained in its July 31, 1963, and September 24, 1963, Section 6 notices until the statutory procedures are exhausted.

2. That the National Mediation Board shall promptly undertake mediation in all docketed FEC cases, both the Carrier's and the Organizations, and if such efforts of the Board to bring about an amicable settlement through mediation should be unsuccessful, the Board shall at once endeavor to induce the parties to submit their controversy to arbitration and if arbitration is refused by one or both parties, the Board shall at once notify the parties in writing that its mediatory efforts have failed and for 30 days thereafter, unless in this intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of the Act, no change will be made in the rates of pay, rules or working conditions or established practices in effect prior to the time dispute arose.

3. That the defendant shall operate under the collective bargaining agreements in effect with the various organizations listed in Exhibits A, B and C to the Complaint, except that defendant may establish and maintain such employment practices, etc., as are, and continue to be reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions, and defendant shall immediately take appropriate steps to bring its operations into compliance with this order and shall proceed with such compliance in a reasonable manner.

313 4. That the defendant has no obligation to fire any replacement under any Union Shop Agreement, at least, until union membership has hereafter been offered without discrimination or reservation and declined by the replacement.

5. That the defendant was, and is, free to hire and pay non-union replacements and upon termination of the strike,

defendant need not discharge or displace such replacements in order to make way for returning strikers.

.....
 Bryan Simpson
Chief Judge
U. S. District Court

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Filed Oct. 5, 1964

**Intervenors' Proposed Findings of Fact and
 Conclusions of Law**

This cause having been heard by the Court on the motion of the plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and the intervenors, and the answer of defendant, and the Court having received testimony and other evidence in open court and heard argument from counsel for all parties, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

(1) The defendant, Florida East Coast Railway Company (FEC), is a corporation organized under the laws of the State of Florida and engaged in interstate commerce as a railroad "Carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. 151) (hereafter, the Act). It is subject to the provisions of said Act, and is classified by the Interstate Commerce Commission as a class 1 railroad. Defendant is licensed to do business and does
 315 business within the Middle Judicial District of Florida, and has its principal place of business in St. Augustine, Florida.

(2) Collective bargaining agreements between defendant and the labor organizations listed in footnotes 1, 2, and 3, *infra*, have been in effect for many years governing rates

of pay, rules and working conditions of certain crafts or classes of defendant's employees. Said collective bargaining agreements, with subsequent changes agreed to by the relevant parties, have been in effect at all times material to this suit.

(3) Since January 23, 1963, the 11 labor organizations listed in footnote 1,¹ representing certain crafts or classes of FEC's non-operating employees, have been legally on strike against FEC. This dispute began on September 1, 1961, with the service of notices by the 11 organizations under Section 6 of the Act (45 U.S.C. 156) seeking a wage increase of 25 cents per hour and six months advance notice of any intended layoff or abolition of positions. FEC's counter-proposals, served on September 18, 1961, called for wage reductions of at least 20% for some 39 groups of middle and lower-range employees in 6 craft groupings; for the establishment of new entry rates for 7 groups of employees in 2 crafts at 80% of existing 316 levels, with certain periodic increases; for the establishment of a flat \$1.25 hourly rate for dining car waiters and other employees serving food and drinks; and for the elimination of all rules or provisions requiring more than 24 hours advance notice prior to abolition of positions or reduction of forces. This September 18, 1961, notice constitutes the outer limits of FEC's proposals during the dispute. The FEC, however, has never attempted or proposed to implement its September 18, 1961, counter-proposals or to change existing agreements as so proposed.

¹ Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Hotel & Restaurant Employees & Bartenders' International Union; International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; Order of Railroad Telegraphers; Sheet Metal Workers' International Association.

(4) The immediate precipitating cause of the strike was FEC's announcement on January 16, 1963 (nearly three months after the National Mediation Board had advised, on October 22, 1962, that it was terminating its services as contemplated by the Act), that all non-operating jobs would be abolished as of January 23, 1963. For a brief period after the strike began the railroad was completely shut down. On February 3, 1963, the defendant resumed freight operations, using supervisory personnel and replacements for those employees who were not reporting for work.

(5) These replacements in both the operating and non-operating crafts made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes.

(6) On September 1, 1963, FEC, without filing any notice under Section 6 of the Act and without negotiation with the relevant labor organizations, unilaterally replaced the individual agreements under which the replacements
317 were working with a uniform set of rates of pay, rules and working conditions, also substantially different from the existing collective bargaining agreements. Each employee reporting for work thereafter was required to waive his rights under the existing collective bargaining agreement for his craft or class, and to agree individually by a signed receipt to accept instead FEC's new "Conditions of Employment," as they were called.

(7) By August, 1963, the defendant was performing 90.06% of the carload freight service performed in a comparable period the preceding year; by September, 1963, the figure was 95.53%; and currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it.

(8) By October 1, 1963, the defendant was operating at this near-capacity level with about 650 employees, as op-

posed to the approximately 2000 employees it had in comparable pre-strike periods. Its vice-president in charge of operations stated on October 1, 1963, that by that time the carrier had achieved nearly the full manpower levels required to maintain stable operations under the rates of pay, rules, and working conditions then actually in effect.

(9) On September 24, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 non-operating organizations listed in footnote 2,² in which it proposed a new "Uniform Working Agreement," substantially the same as the September 1 Conditions of Employment and constituting a comprehensive revision of the rates of pay, rules and working conditions contained in the governing collective bargaining agreements with the 17 organizations.

(10) After a meeting between representatives of the organizations and FEC on October 18, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested by the 17 organizations on October 23, 1963, in a letter with attachments which was received by the Board on October 28, 1963. The Mediation Board assumed jurisdiction, and on October 31, 1963, docketed the dispute as Case No. A-7055.

² American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Dining Car Employees Union; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

(11) One of the 17 organizations, the International Association of Railway Employees (IARE), resumed negotiations on October 22, 1963, and requested that it not be included in Case No. A-7055. These negotiations terminated on December 18, 1963, and the IARE invoked the Board's services on December 26, 1963. On January 6, 1964, the Board docketed the dispute as Case No. A-7093.

(12) Cases No. A-7055 and A-7093 are still pending before the National Mediation Board.

(13) Nevertheless, on October 30, 1963, FEC unilaterally put into effect the new Uniform Working Agreement contained in its notice of September 24, 1963. The non-operating employees of the carrier have been since that time and are at present actually working under the rates of 319 pay, rules, and working conditions set forth in that document. The Uniform Working Agreement is not, however, in effect as to the IARE.

(14) By letter to the 17 organizations dated October 30, 1963, with copy to the National Mediation Board, FEC advised that in its view the organizations had disentitled themselves to invoke the Board's services by refusing on October 18 to confer in the presence of a court reporter.

(15) Asserting that its agreements with all organizations are suspended during the pendency of a strike and that it is free to put into operation whatever rates of pay, rules, and working conditions it deems necessary to maintain operations, the defendant FEC has stated that it will revert to the September 1, 1963, Conditions of Employment or substantially similar conditions if prevented from operating under the September 24, 1963, Uniform Working Agreement.

(16) Although since August, 1963, the defendant railroad has been handling carload freight in quantities comparable to its pre-strike traffic, it has not restored less-than-carload freight or passenger service; its employment

has leveled off, apart from replacement of normal turnover, at approximately 850 employees; it describes the overall personnel policy which it has followed since February 3, 1963, as a "long range program" designed to achieve maximum efficiency with qualified employees. It has been the purpose of the railroad to recruit a work force of sufficient personnel to enable it to provide full service to the public under the duly negotiated collective bargaining agreements. There is no shortage of applicants available to the defendant FEC to expand its present manpower requirements.

320 (17) On July 31, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 organizations listed in footnote 3,⁸ in which it proposed to cancel and abolish the union shop provisions of its collective bargaining agreements with these organizations, effective September 1, 1963.

(18) After a meeting between representatives of the organizations and FEC on August 29, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested on September 4, 1963, in a letter with attachments received by the Board, by 16 of the organizations on September 6, 1963. The Mediation Board assumed jurisdiction, and on October 11, 1963, docketed the dispute as Case No. A-7027.

⁸ American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers; Joint Council Dining Car Employees; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

The matter is still pending before the Mediation Board. The American Train Dispatchers Association requested the Board's services in a separate application, which was docketed by the Board as Case No. A-7022. This matter is also still pending before the Mediation Board.

(19) Nevertheless, on September 9, 1963, FEC unilaterally put into effect the proposal contained in its notice of July 31, 1963, and purported to cancel and abolish the union shop provisions of its collective bargaining agreements with the respective labor organizations. By letter dated September 13, 1963, the carrier advised the Mediation Board that in its view the organizations had forfeited their right to invoke the Board's services by refusing on August 29 to confer in the presence of a court reporter.

(20) As to all non-operating crafts and classes on the FEC property which are represented by the organizations set forth in footnotes 1, 2 and 3, *supra*, the FEC is presently imposing the rules, rates of pay and working conditions embodied in its Section 6 proposals of September 24, 1963, and has announced its intention, if prohibited from continuing such rules, rates of pay, and working conditions, of returning to the rules, rates of pay and working conditions set forth in its September 1, 1963, "Conditions of Employment" (which are substantially the same). These presently imposed rules, rates of pay, and working conditions are materially different from the existing collective bargaining agreements in effect between the FEC and the organizations representing such crafts and classes of employees.

(1) This Court has jurisdiction of the subject matter of this suit and of the parties. The jurisdiction of this Court to grant an injunction exists under 28 U.S.C. 1345, 1331, and 1337.

(2) The United States has standing to maintain this action. *In re Debs*, 158 U.S. 564, 584, 586 (1895).

(3) Section 2 of the Railway Labor Act (45 U.S.C. 152) provides in relevant part:

“First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

“Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

• • • • •

“Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

• • • • •

“Eleventh. Notwithstanding any other provision of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

- 323 (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

• • • • •

(4) Section 5, First of the Railway Labor Act (45 U.S.C. 155, First) provides:

“First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

- (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
- (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

“The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

- 324 "If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

(5) Section 6 of the Railway Labor Act (45 U.S.C. 156) provides:

"Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services, of the Mediation Board have been requested

by either party, or said Board was proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(6) The disputes as to rates of pay, rules, and working conditions involving the FEC's Section 6 notices of July 31, 1963, and September 24, 1963, and involving the institution by the FEC on September 1, 1963, of the "Conditions of Employment" and involving the negotiation of individual employment contracts on a wholesale basis during the period of February 3, 1963, to September 1, 1964, are "major" disputes within the meaning of the Railway Labor Act. *Elgin, J. & E.R. Co. v. Burley*, 325 U.S. 711, 722-724 (1945); *Florida East Coast Railway Co. v. Brotherhood of Railroad Trainmen, AFL-CIO* (C.A. 325, No. 21356, August 18, 1964), F. 2d .

(7) The labor organizations listed in footnotes 2 and 3, *supra*, made a timely and proper invocation of the services of the National Mediation Board as to both the notice of July 31, 1963, and the notice of September 24, 1963.

(8) FEC's purported effectuation of the proposals contained in the notices of July 31, 1963, and September 24, 1963, before mediation could be commenced, violated Sections 2, Seventh; 5, First; and 6 of the Railway Labor Act (45 U.S.C. 152, (Seventh, 155, First, 156), and frustrated the purpose manifested in the Act to provide for orderly settlement of "major" disputes involving proposed changes in rates of pay, rules, and working conditions. *Florida East Coast Railway Co. v. Brotherhood of Railroad Trainmen, AFL-CIO, supra*.

(9) The institution, without pretense of compliance with any of the procedures of Section 6 of the Act, of wholesale changes in rates of pay, rules, and working conditions by the FEC on September 1, 1963, by the promulgation and purported effectuation of the "Conditions of Employment," for which each individual employee was made to sign a receipt agreeing to waive his rights under the existing collective bargaining agreement as to his craft or class and agreeing to accept instead said "conditions of Employment," violated Sections 2, First, Second, Seventh; and Section 5, First; and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

326 (10) FEC's exaction of individual agreements by its replacement employees during the period February 3, 1963, to September 1, 1963, on terms as to rates of pay, rules, and working conditions substantially different from the collective bargaining agreements in force for the relevant crafts or classes of employees without the issuance of a Section 6 notice or with any of the procedures of Section 6 and without pretense at compliance with the Act, violated the Act's implied prohibition against bargaining with individual employees as to matters which are the subject of collective bargaining and violated Sections 2, First, Second, Seventh, and Section 5, First, and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(11) Injunctive relief to restore the status quo ante is proper in these circumstances to insure that the processes of mediation and negotiation can be carried on in the atmosphere of stability contemplated by the Act and in order to prevent the frustration of the statutory mechanism for orderly settlement of major disputes.

(12) The Norris-LaGuardia Act, 29 U.S.C. 101, et seq., is no bar to injunctive relief in the present circumstances to enforce the mandates of the Railway Labor Act.

(13) The fact that a strike is in progress on the FEC does not justify the wholesale abrogation of existing collective bargaining agreements, but does afford the defendant FEC, on appropriate application to this Court therefor and evidentiary showing in support thereof, the right
 327 to make such changes in existing rules and working conditions as are reasonably necessary in order for the FEC to continue to operate during the strike. Any such changes as the FEC contends are justified by this exception must be presented to this Court on an item-by-item basis for review and determination hereafter.

(14) FEC's actions in violation of the Act as found hereinabove threaten irreparable injury to the public interest and to the rights of intervenors and the employees of defendant FEC under the Railway Labor Act for which there is no adequate remedy at law.

(15) Plaintiff, United States of America, and intervenors are entitled to a preliminary injunction restoring the status quo ante until further order of this Court.

Chief Judge

328

Filed October 5, 1964

Intervenors' Proposed Preliminary Injunction

This matter coming on to be heard on the motion of the plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and intervenors, and the answer of defendant; and,

Each of the parties being represented by counsel and the Court having received testimony and other evidence and heard argument of counsel in light of the record before it; and the Court having made Findings of Fact and Conclusions of Law which are filed herewith, it is

ORDERED, ADJUDGED and DECREED:

1. That the defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert of participation with them, are enjoined restrained, until further order of this Court from:

(a) in any manner continuing in effect or implementing in any respect the changes in rates of pay, rules or working conditions announced in FEC's notices of September 24, 1963, and July 31, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees affected by said notices, or until the controversies have been finally acted upon by the National Mediation Board, as provided in Sections 5 and 6 of the Railway Labor Act (45 U.S.C. 155, 156);

(b) taking any action under any further notice attempting to make changes in rates of pay, rules or working conditions, except in accordance with the procedures of Section 6 of the Railway Labor Act (45 U.S.C. 156);

(c) in any manner continuing in effect or taking any action under FEC's "Conditions of Employment" promulgated September 1, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees;

(d) making or continuing in effect any individual agreements with FEC's employees in any craft or class for which a collective bargaining representative has been designated, except in accordance with the provisions of the collective bargaining agreement for said craft or class; or

(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes covered by existing collective bargaining agreements except in accordance with the procedures of the Railway

Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike.

330 2. The defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are further mandatorily required and directed, until further order of this Court,

(a) to revoke, cancel and annul all action taken and notices given purporting to put into effect the changes in rates of pay, rules and working conditions proposed in FEC's notices of July 31, 1963, and September 24, 1963, and in its "Conditions of Employment" of September 1, 1963;

(b) to reinstate and maintain the rates of pay, rules, and working conditions as embodied in existing collective bargaining agreements covering its employees until and unless said agreements are modified in accordance with the procedures of the Railway Labor Act or until and unless specifically authorized on application therefor by this Court; and

(c) to bargain in good faith with the labor organizations representing the crafts or classes of FEC's employees.

DONE AND ORDERED at Jacksonville, Florida, this day
of , 1964.

.....
Chief Judge

United States District Court

Filed October 30, 1964

Findings of Fact and Conclusions of Law

This cause having been heard by the Court on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and the intervenors, and the answer of Defendant, and the Court having received testimony and other evidence in open court and heard argument from counsel for all parties, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Defendant, Florida East Coast Railway Company (FEC), is a corporation organized under the laws of the State of Florida and engaged in interstate commerce as a railroad "carrier" as defined in Section 1 of the Railway Labor Act (45 U.S.C. 151) (hereafter, the Act). It is subject to the provisions of said Act, and is classified by the Interstate Commerce Commission as a class 1 railroad. Defendant is licensed to do business and does business within the Middle Judicial District of Florida, and
332 has its principal place of business in St. Augustine, Florida.

2. Collective bargaining agreements between Defendant and the labor organizations listed in footnotes 1, 2 and 3, *infra*, have been in effect for many years governing rates of pay, rules and working conditions of certain crafts or classes of Defendant's employees. Said collective bargaining agreements, with subsequent changes agreed to by the relevant parties, have been in effect at all times material to this suit.

3. Since January 23, 1963, the 11 labor organizations listed in footnote 1,¹ representing certain crafts or classes of FEC's non-operating employees, have been legally on strike against FEC. This dispute began on September 1, 1961, with the service of notices by the 11 organizations under Section 6 of the Act (45 U.S.C. 156) seeking a wage increase of 25 cents per hour and six months advance notice of any intended layoff or abolition of positions. FEC's counter-proposals, served on September 18, 1961, called for wage reductions of at least 20% for 39 groups of middle and lower-range employees in 6 craft groupings; for the establishment of new entry rates for 7 groups of employees in 2 crafts at 80% of existing levels, with 333 certain periodic increases; for the establishment of a flat \$1.25 hourly rate for dining car waiters and other employees serving food and drinks; and for the elimination of all rules or provisions requiring more than 24 hours advance notice prior to abolition of positions or reduction of forces. This September 18, 1961, notice constitutes the outer limits of FEC's proposals during the dispute. The FEC, however, has never attempted or proposed to implement its September 18, 1961, counter-proposals or to change existing agreements as so proposed.

4. The immediate precipitating cause of the strike was FEC's announcement on January 16, 1963 (nearly three months after the National Mediation Board had advised, on October 22, 1962, that it was terminating its services as contemplated by the Act), that all non-operating jobs would be abolished as of January 23, 1963. For a brief

¹ Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Hotel & Restaurant Employees & Bartenders' International Union; International Association of Machinists; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; Order of Railroad Telegraphers; Sheet Metal Workers' International Association.

period after the strike began the railroad was completely shut down. On February 3, 1963, the Defendant resumed freight operations, using supervisory personnel and replacements for those employees who were not reporting for work.

5. These replacements in both the operating and non-operating crafts made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes.

6. On September 1, 1963, FEC, without filing any notice under Section 6 of the Act and without negotiation with the relevant labor organizations, unilaterally replaced the individual agreements under which the replacements
334 were working with a uniform set of rates of pay, rules and working conditions, also substantially different from the existing collective bargaining agreements. Each employee reporting for work thereafter was required to waive his rights under the existing collective bargaining agreement for his craft or class, and to agree individually by a signed receipt to accept instead FEC's new "Conditions of Employment", as they were called.

7. By August, 1963, the Defendant was performing 90.06% of the carload freight service performed in a comparable period the preceding year; by September, 1963, the figure was 95.53%; and currently the railroad is carrying carload freight at a volume equal to or in excess of seasonally comparable pre-strike levels, and is handling all the freight traffic that is presented to it.

8. By October 1, 1963, the Defendant was operating at this near-capacity level with about 650 employees, as opposed to the approximately 2000 employees it had in comparable pre-strike periods. Its vice-president in charge of operations stated on October 1, 1963, that by that time the

carrier had achieved nearly the full manpower levels required to maintain stable operations under the rates of pay, rules, and working conditions then actually in effect.

9. On September 24, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 non-operating organizations listed in footnote 2,² in which it proposed a new "Uniform Working Agreement", substantially the same as the September 1 Conditions of Employment and constituting a comprehensive revision of the rates of pay, rules and working conditions contained in the governing collective bargaining agreements with the 17 organizations.

10. After a meeting between representatives of the organizations and FEC on October 18, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested by the 17 organizations on October 23, 1963, in a letter with attachments which was received by the Board on October 28, 1963. The Mediation Board assumed jurisdiction, and on October 31, 1963, docketed the dispute as Case No. A-7055.

11. One of the 17 organizations, the International Association of Railway Employees (IARE), resumed negotiations on October 22, 1963, and requested that it not be

² American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; Dining Car Employees Union; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse and Railway Shop Laborers; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

included in Case No. A-7055. These negotiations terminated on December 18, 1963, and the IARE invoked the Board's services on December 26, 1963. On January 6, 1964, the Board docketed the dispute as Case No. A-7093.

12. Cases No. A-7055 and A-7093 are still pending before the National Mediation Board.

13. Nevertheless, on October 30, 1963, FEC unilaterally put into effect the new Uniform Working Agreement contained in its notice of September 24, 1963. The non-operating employees of the carrier have been since that time and are at present actually working under the rates of pay, rules, and working conditions set forth in that document. The Uniform Working Agreement is not, however, in effect as to the IARE.

14. By letter to the 17 organizations dated October 30, 1963, with copy to the National Mediation Board, FEC advised that in its view the organizations had disentitled themselves to invoke the Board's services by refusing on October 18 to confer in the presence of a court reporter.

15. Asserting that its agreements with all organizations are suspended during the pendency of a strike and that it is free to put into operation whatever rates of pay, rules, and working conditions it deems necessary to maintain operations, the Defendant FEC has stated it will revert to the September 1, 1963, Conditions of Employment or substantially similar conditions if prevented from operating under the September 24, 1963, Uniform Working Agreement.

16. Although since August, 1963, the Defendant railroad has been handling carload freight in quantities comparable to its pre-strike traffic, it has not restored less-than-carload freight or passenger service, its employment has leveled off, apart from replacement of normal turnover, at approximately 850 employees;

it describes the overall personnel policy which it has followed since February 3, 1963, as a "long range program" designed to achieve maximum efficiency with qualified employees. It has not been the purpose of the railroad to recruit a work force of sufficient personnel to enable it to provide full service to the public under the duly negotiated collective bargaining agreements. There is no shortage of applicants available to the Defendant FEC to expand its present manpower requirements.

17. On July 31, 1963, FEC served a notice pursuant to Section 6 of the Act upon the 17 organizations listed in footnote 3,³ in which it proposed to cancel and abolish the union shop provisions of its collective bargaining agreements with these organizations, effective September 1, 1963.

18. After a meeting between representatives of the organizations and FEC on August 29, 1963, to discuss the notice was terminated because the parties could not agree whether to confer in the presence of a court reporter, the services of the National Mediation Board were requested on September 4, 1963, in a letter with attachments received by the Board, by 16 of the organizations on September 6, 1963. The Mediation Board assumed jurisdiction, and on October 11, 1963, docketed the dispute as Case No. A-7027. The matter is still pending

³ American Railway Supervisors Association, Inc.; American Train Dispatchers Association; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway Carmen of America; Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees; International Association of Machinists; International Association of Railway Employees; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen, Oilers, Helpers, Roundhouse & Railway Shop Laborers; Joint Council Dining Car Employees; Order of Railroad Telegraphers; Railroad Yardmasters of America; Sheet Metal Workers' International Association; United Transport Service Employees (Red Caps); and United Transport Service Employees (Train Porters).

before the Mediation Board. The American Train Dispatchers Association requested the Board's services in a separate application, which was docketed by the Board as Case No. A-7022. This matter is also still pending before the Mediation Board.

19. Nevertheless, on September 9, 1963, FEC unilaterally put into effect the proposal contained in its notice of July 31, 1963, and purported to cancel and abolish the union shop provisions of its collective bargaining agreements with the respective labor organizations. By letter dated September 13, 1963, the carrier advised the Mediation Board that in its view the organizations had forfeited their right to invoke the Board's services by refusing on August 29 to confer in the presence of a court reporter.

20. As to all non-operating crafts and classes on the FEC property which are represented by the organizations set forth in footnotes 1, 2 and 3, *supra*, the FEC is presently imposing the rules, rates of pay and working conditions embodied in its Section 6 proposals of September 24, 1963, and has announced its intention, if prohibited from continuing such rules, rates of pay, and working conditions, of returning to the rules, rates of pay and working conditions set forth in its September 1, 1963, "Conditions of Employment" (which are substantially the same).

339 These presently imposed rules, rates of pay, and working conditions are materially different from the existing collective bargaining agreements in effect between the FEC and the organizations representing such crafts and classes of employees.

CONCLUSIONS OF LAW

(1) This Court has jurisdiction of the subject matter of this suit and of the parties. The jurisdiction of this Court to grant an injunction exists under 28 U.S.C. 1345, 1331, and 1337.

(2) The United States has standing to maintain this action. *In re Debs*, 158 U.S. 564, 584, 586 (1895).

(3) The disputes as to rates of pay, rules, and working conditions involving the FEC's Section 6 notices of July 31, 1963, and September 24, 1963, and involving the institution by the FEC on September 1, 1963, of the "Conditions of Employment" and involving the negotiation of individual employment contracts on a wholesale basis during the period of February 3, 1963, to September 1, 1963, are "major" disputes within the meaning of the Railway Labor Act. *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 722-724 (1945); *Florida East Coast Railway Co. v. Brotherhood of Railroad Trainmen, AFL-CIO* (C.A. 5, No. 21356, August 18, 1964), F. 2d .

(4) The labor organizations listed in footnotes 2 and 3, *supra*, made a timely and proper invocation of the services of the National Mediation Board as to both the notice of July 31, 1963, and the notice of September 24, 1963.

(5) FEC's purported effectuation of the proposals contained in the notices of July 31, 1963, and September 24, 1963, before mediation could be commenced, violated Sections 2, Seventh; 5, First; and 6 of the Railway Labor Act (45 U.S.C. 152, Seventh, 155, First, 156), and frustrated the purpose manifested in the Act to provide for orderly settlement of "major" disputes involving proposed changes in rates of pay, rules, and working conditions. *Florida East Coast Railway Co. v. Brotherhood of Railroad Trainmen, AFL-CIO, supra*.

(6) The institution, without pretense of compliance with any of the procedures of Section 6 of the Act, of wholesale changes in rates of pay, rules, and working conditions by the FEC on September 1, 1963, by the promulgation and purported effectuation of the "Conditions of Employment", for which each individual employee was made to

sign a receipt agreeing to waive his rights under the existing collective bargaining agreement as to his craft or class and agreeing to accept instead said "Conditions of Employment", violated Sections 2, First, Second, Seventh; and Section 5, First; and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(7) FEC's exaction of individual agreements by its replacement employees during the period February 3, 1963, to September 1, 1963, on terms as to rates of pay, rules, and working conditions substantially different from the collective bargaining agreements in force for the relevant crafts or classes of employees without the issuance of a Section 6 notice or with any of the procedures of Section 6 and without pretense at compliance with the Act, violated the Act's implied prohibition against bargaining with individual employees as to matters which are the subject of collective bargaining and violated Sections 2, First, Second, Seventh, and Section 5, First, and Section 6 of the Railway Labor Act (45 U.S.C. 152, First, Second, Seventh, 155, First, and 156).

(8) Injunctive relief to restore the status quo ante is proper in these circumstances to insure that the processes of mediation and negotiation can be carried on in the atmosphere of stability contemplated by the Act and in order to prevent the frustration of the statutory mechanism for orderly settlement of major disputes.

(9) The Norris-LaGuardia Act, 29 U.S.C. 101, et seq., is no bar to injunctive relief in the present circumstances to enforce the mandates of the Railway Labor Act.

(10) The fact that a strike is in progress on the FEC does not justify the wholesale abrogation of existing collective bargaining agreements, but does afford the Defendant FEC, on appropriate application to this Court therefor and evidentiary showing in support thereof, the right

to make such changes in existing rules and working conditions as are reasonably necessary in order for the FEC to continue to operate during the strike. Any such changes as the FEC contends are justified by this exception must be presented to this Court on an item-by-item basis for review and determination hereafter.

(11) FEC's actions in violation of the Act as found hereinabove threaten irreparable injury to the public interest and to the rights of intervenors and employees of Defendant FEC under the Railway Labor Act for which there is no adequate remedy at law.

(12) Plaintiff, United States of America, and intervenors are entitled to a preliminary injunction restoring the status quo ante until further Order of this Court. Since said preliminary injunction will issue upon the application of the United States, no requirement need be made for security. (See Rule 65, F.R. Civ. P.)

BRYAN SIMPSON
Chief Judge,
U. S. District Court

Jacksonville, Florida
 October 30, 1964.

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Filed Oct. 30 1964

Preliminary Injunction

This matter coming on to be heard on the Motion of the Plaintiff, the United States of America, for a preliminary injunction, the complaints of the United States of America and intervenors, and the answer of Defendant; and,

Each of the parties being represented by counsel and the Court having received testimony and other evidence and heard argument of counsel in light of the record before

it; and the Court having made Findings of Fact and Conclusions of Law which are filed herewith, it is

ORDERED, ADJUDGED AND DECREED:

1. That the Defendant, Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are enjoined and restrained, until further Order of this Court, from:

(a) in any manner continuing in effect or implementing in any respect the change in rates of pay, rules or working conditions announced in FEC's notices of September 24, 1963, and July, 31, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees affected by said notices, or until the controversies have been finally acted upon by the National Mediation Board, as provided in Sections 5 and 6 of the Railway Labor Act (45 U.S.C. 155, 156);

(b) taking any action under any further notice attempting to make changes in rates of pay, rules or working conditions, except in accordance with the procedures of Section 6 of the Railway Labor Act (45 U.S.C. 156);

(c) in any manner continuing in effect or taking any action under FEC's "Conditions of Employment" promulgated September 1, 1963, except by agreement with the labor organizations representing the several crafts or classes of FEC's employees;

(d) making or continuing in effect any individual agreements with FEC's employees in any craft or class for which a collective bargaining representative has been designated, except in accordance with the provisions of the collective bargaining agreement for said craft or class; or

(e) making any other changes in rates of pay, rules or working conditions of its employees in crafts or classes

covered by existing collective bargaining agreements except in accordance with the procedures of the Railway Labor Act or except upon specific authorization of this Court after a finding of reasonable necessity therefor upon application of the FEC to this Court during the pendency of the current strike.

2. The Defendant Florida East Coast Railway Company (FEC), its officers, agents, servants, employees and attorneys, and all persons in active concert or participation with them, are further mandatorily required and directed, until further Order of this Court,

(a) to revoke, cancel and annul all action taken and notices given purporting to put into effect the change in rates of pay, rules and working conditions proposed in FEC's notices of July 31, 1963, and September 24, 1963, and in its "Conditions of Employment" of September 1, 1963;

(b) to reinstate and maintain the rates of pay, rules, and working conditions as embodied in existing collective bargaining agreements covering its employees until and unless said agreements are modified in accordance with the procedures of the Railway Labor Act or until and unless specifically authorized on application therefore by this Court; and

(c) to bargain in good faith with the labor organizations representing the crafts or classes of FEC's employees.

3. In order to permit the Defendant to make necessary changes and adjustments in its operations, the injunctive provisions of numbered Paragraphs 1 and 2 hereof shall become effective fourteen (14) days after the entry thereof.

DONE AND ORDERED at Jacksonville, Florida, this 346 30th day of October, 1964.

BRYAN SIMPSON

Chief Judge, U. S. District Court

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Filed Nov. 5, 1964

Return on Service of Writ

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF FLORIDA

USA v. FLORIDA EAST COAST RAILWAY CO.
J-6755-C1, Ct. No. 64-107-Civ-J

I hereby certify and return that I served the annexed Preliminary Injunction on the therein-named Florida East Coast Railway Company by handing to and leaving a true and correct copy thereof with Raymond W. Wykoff, Vice-President of Florida East Coast Railway Co. personally at F.E.C. Offices at St. Augustine, Florida in the said District at 9:10 a. m., on the 31st day of Oct., 1964

JOHN E. MAGUIRE, SR.
United States Marshal.

By R. B. SAUCER, JR.,
R. B. Saucer,
Deputy.

Marshall's fees	3.00
Mileage	9.12
	\$12.12

348

Filed Nov. 12, 1964

Motion for Stay of Portion of Order

Defendant has filed an application herein for approval of employment practices necessary to the effectuation of defendant's right to continue to operate and provide service to the public. Pending hearing and determination of this application, defendant moves for an order staying those portions of its order of October 30, 1964, with respect to enforcement of existing collective bargaining agreements in regard to strict observance of craft and seniority district restrictions, performance of craft work by exempt

and non-exempt supervisors, apprentice ratios and maximum age limitations for apprentices, contracting out of work when defendant does not have personnel available to perform work, performance of bridge tenders by supervisory employees or by security guard, furnishing seniority rosters, and enforcement of union shop provisions.

In support of its Motion for Stay of Portion of Order defendant shows, as follows:

1. Immediately upon receipt of the order of October 30, 1964, bulletins were prepared and issued for one hundred and fourteen positions immediately required to permit full compliance with the existing collective bargaining agreements. Until the bulletining periods provided in the respective agreements had expired, defendant could not anticipate whether sufficient employees would be available to permit full compliance with the Order of October 30, 1964.

349 2. Except as indicated herein and in its Application for Approval of Employment Practices defendant has effectuated full compliance with the Order of October 30, 1964.

3. Defendant does not have sufficient personnel available to comply with the provisions respecting craft and seniority district restrictions, performance of craft work by supervisors, performance of various work which has been contracted out since commencement of the strike because of the lack of available personnel and it has been unable to secure sufficient qualified personnel to perform such work in accordance with existing collective bargaining agreements despite the fact that it has hired and trained employees since the commencement of the strike as rapidly as its capacities has permitted. Bridge Tending has as a necessary part of over all security been performed since the strike began by supervisory employees or security guards and must continue to be performed in this manner in the interest of security for the duration of the strike.

4. Defendant has no objection to furnishing seniority rosters, provided only that the use of the names of present employes be used only for legitimate purposes of the Organizations and not for continued harassment of these employes. Pending hearing and determination of this request Defendant has not furnished such rosters although such Information will be made available upon request for the policing of the various agreements.

5. The various organizations have discriminated against present employes and returnees with respect to the availability of union membership and pending hearing and determination of this request with respect to the union shop provisions of various agreements, application of these provisions should be stayed since the discrimination would in any event, render any request for discharge thereunder void and unforceable.

In support of this motion the affidavits of W. L. Thornton, President, Florida East Coast Railway, marked as Defendant's Exhibit 15; R. W. Wyckoff, Vice President and Director of Personnel, marked as Defendant's Exhibit 16; H. E. Hales, General Superintendent Motive Power, marked Exhibit 17; H. E. Webb, Superintendent Communications and Signals, marked as Defendant's Exhibit 18, which are submitted herewith and made a part hereof.

WHEREFORE, Defendant prays:

(A) An Order staying those portions of the Order of October 30, 1964, with respect to enforcement of existing collective bargaining agreements with respect to strict observance of craft and seniority district restrictions, performance of craft work by exempt and non-exempt supervisors, apprentice ratios and maximum age limitations for apprentices, contracting out of work when defendant does not have personnel available to perform, performance of bridge tending by supervisory employes or security guards,

furnishing of seniority rosters, and enforcement of union shop provisions pending hearing and determination of Defendant's Application for Approval of Employment Practices.

(B) An order setting Defendant's Application for Approval of Employment Practices for hearing.

(C) For such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonville, Florida

Attorneys for Defendant

Of Counsel:

STEPTOE & JOHNSON
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Washington, D. C. 20005

351

CERTIFICATE OF SERVICE
(Omitted)

352

Affidavit of W. L. Thornton, President

STATE OF FLORIDA }
COUNTY OF ST. JOHNS } ss:

1. My name is W. L. Thornton, and I am President of the Florida East Coast Railway Company.

2. I have reviewed with my various Department heads and have personally studied the problem of compliance with the Order of the Court of October 30, 1964. We

have already taken steps to comply fully with the terms of that Order except to the extent indicated in our application for approval of employment practices. The Railway must continue its use of exempt and scope supervisors to perform a certain craft work, must be able to use available employes without regard to strict craft lines, must be able to hire available qualified employes without regard to the ratio of apprentices to journeymen, or maximum age limitations on apprentices, and must continue the performance of bridge tending with supervisors or contract employes in the interest of security for the duration of the strike or it cannot continue to provide the service it is now providing to the public, nor can it continue the safe operation of the railroad which will quickly affect the safety of the employes and the public situated along the right of way or at crossings.

The immediate reduction of service which would be required in such event is not easy to fix with certainty. If exempt and scope supervisors were unable to perform any scope work, there are certain jobs which they are now performing which the Railway would not have other qualified employes available to perform. This work is essential to the continued operation of the Railroad, and to the
353 safety of our employes. In an overall evaluation, the Railway would be faced with a very substantial reduction in service of between 30% and 50% which although it would not be an immediate reduction to the full extent, such reduction would be required in a very short period of time because of the lack of sufficient qualified employes to perform the work in strict accordance with the various collective bargaining agreements.

In an effort to obtain the qualified employes necessary to perform the work of the various non-operating employes in full compliance with existing collective bargaining agreements, 114 jobs were bulletined. This represented the immediate number of jobs required to comply fully with the

agreements. In response to these bulletins, the Railway received a total of 3 bids from the striking employes, one from a person who was not qualified for the position bid on. The Railway has received letters from a number of the General Chairman stating, in effect, that they were instructing their members not to respond to these bulletins for the reason that they were engaged in a legal strike.

From the beginning of the strike the Railway has endeavored to hire and train employes as rapidly as possible. Many of the positions involved require little or no training and these positions were filled with a minimum of difficulty. With respect to the remainder, however, there is a long training period. The various craft agreements set forth the normal training time which is about 4 years in most cases. The Railway has endeavored to secure employes with as much training and experience as possible. Despite its efforts, few fully qualified craftsmen, meeting the
354 requirements of the craft agreements, have been found and the great majority of the employes hired since the strike began have not been fully qualified and have had no prior railroad experiences. This has meant that they must be placed at various levels of the training program in accordance with their experience and qualifications. Many of these new employes were highly qualified and highly skilled in certain phases of the work they performed; however, they were not fully qualified to do all the work and this has continued to necessitate the performance of certain craft work by supervisors, both exempt and scope. Training of these employes has required intensive supervision as well as supervisors working with trainees as part of their "on-the-job" training. This continues to be true.

Nor is the problem of training by any means limited to the mechanical crafts. Indeed, many of the positions of clerks not only have a long training period, but experienced employes are available from no other source than the

railroads. For example, the minimum training time for rate and division clerks is two years. The duties of this employe involves, in part, the checking of rates applied to waybills and prorating the divisions revenue due this Railway and other railroads. This work is essential to every railroad and our experience over the years, as well as the experience in the industry, is that the minimum of training time required is two years if the person is an extremely capable individual. The two-year period is by no means the average time actually required. With the strike the Railway was left without any rate and division clerks. It has hired three persons who are learning
 355 to be rate and division clerks, but they are not fully qualified and much of the work is still being done by various supervisory employes who have been rate and division clerks and who are the only fully qualified persons available for this work. The three trainees represent the maximum number of trainees the Railway can train at one time because of the necessity for close supervision and direction of their work, performance of much of the rate and division work being done by supervisors because of the lack of experience on the part of the trainees to perform it.

Many other examples could be given. In general the pattern is the same for all positions in the mechanical crafts as well as in the office, accounting and tariff positions which require long and intensive training.

Since the strike began on January 23, 1963, various changes have occurred with respect to new equipment and methods of operating which will substantially reduce the number of employes required to perform the work with this new equipment and new techniques as compared to prestrike requirements. In the Maintenance of Way Department, for example, centralized traffic control, which is now being installed, will when completed make the Railway a single track railroad with long passing tracks. This

will greatly reduce the number of main line miles of track to be maintained and will require fewer crossover switches and will reduce maintenance. A caterpillar front end loader with winch has been acquired for relocating switches and turnouts. This unit will perform work with 4 men in approximately 3 hours that formerly required 12-
356 man force three days. Track lining in the past was a slow and time-consuming operation, requiring 8 to 10 men. It is now being done by this machine utilizing one machine operator and one laborer. Ties are now unloaded from special tie cars which are equipped with an unloader requiring one operator and one laborer. Previously the unloading of ties from gondola cars by hand required 10 to 12 track laborers. Various other new machinery has been acquired, permitting surfacing of turnouts and switches, also a Diesel ballast regulator. In addition, "hi-rail" trucks have replaced motor cars and are equipped with radios, impact wrenches, electric tamping units, electric saws and drills and other more efficient tools so that these trucks with small forces are highly mobile and permit the performance of maintenance by the same crew over a greatly increased area. For these reasons the Railway will not require the number of employees in the Maintenance of Way Department that it had prior to the strike to comply fully with the various agreements. Prior to January, 1963, there were 259 employees in the Maintenance of Way Department. We currently have 115 and, except for one bridge gang of a foreman and 6 men, a crossing gang of a foreman and 8 men, and a temporary track removal gang of a foreman and 18 men, the Railway is now fully complying with the collective bargaining agreement. The work performed by the above-mentioned gangs is now being contracted out for the reason that the Railway does not have now, and did not have at the time the work was contracted out, qualified foremen to supervise the work. Without qualified foremen, the laborers would be of no value in performing this work.

357 Prior to the strike, bridge tenders were covered by the Maintenance of Way Agreement. Since commencement of the strike, for security reasons, the Railway has had to perform this work with supervisory or contracted security guards as part of the overall security required by strike conditions. From the beginning of the strike on January 23, 1963, the Railway has been beset with a long series of acts of sabotage against its property and equipment, which have included 9 actual dynamitings, two attempted dynamitings, attempted derailments, actual derailments, misaligning of rail, cocking of switches, placing heavy chains around the rails and placing of derailleurs on the track. One of the dynamitings involved the bridge at Rose Bay, another involved a bridge at North Miami, a third involved a bridge in the vicinity of Vero Beach, and a fourth involved a bridge at Mile Post K-8.67 south of Fort Pierce on the Lake Harbor Branch. As a result of sabotage there has been a total of 16 locomotives and 162 cars derailed or thrown from track. Attempted dynamitings of a bridge in the vicinity of Fort Pierce was thwarted by agents of the F.B.I. The Railway has necessarily had to take extensive security precautions and as a part of the overall security has performed the duty of bridgetending with supervisors or by security guards. It must continue to do so in order to maintain proper security. Moreover the General Chairman of the Brotherhood of Maintenance of Way Employees advised the Company that the employees he represents have been instructed not to respond to the bulletins because they were engaged in a legal authorized strike.

In the Transportation Department a very much
358 smaller force is now employed than was employed prior to the strike. To a very considerable extent this difference in employment level is attributable directly to the fact that the Railway, because of the numerous acts of sabotage, vandalism and harassment, is not providing passenger service. To the extent possible, the Railway

has already taken steps to fully comply with existing agreements insofar as this Department is concerned. There are several instances where supervisory employes are performing scope work. As has been true with the Maintenance of Way Department, changes in techniques and equipment has resulted in a reduction in the number of employes required for the performance of certain tasks. For example, billing which formerly required the retyping of the billing information from the waybill to the freight bill is now reproduced by means of a Xerox machine, the waybills being used in lieu of freight bills. I.B.M. punch card equipment is also being substituted in various instances for records formerly maintained and has resulted in a considerable lessening of manpower requirements. Nevertheless, we are still forced to use exempt and non-scope supervisors to perform scope work and are required to use employes to perform work they are qualified to perform without regard to strict craft lines. The Railway has hired and trained employes in this Department as rapidly as possible but still does not have sufficient qualified employes to comply insofar as work by supervisors and craft restrictions are concerned.

In the Accounting Department the Railway is still compelled to use excepted personnel to perform various
 359 jobs previously filled by scope employes. The Railway has advertised 17 positions which, had it received qualified employes, would have permitted it to comply fully with existing agreements in the Accounting Department. In the absence of qualified employes, the work must continue to be performed by exempt employes. Not only has this long-range implications, but in all phases of the Railway's accounting procedures, reports to the I. C. C., interline freight divisions currently in the process of completion cannot be completed if the supervisory employes are not permitted to complete them. This will mean that these reports will be immediately delayed. All 17 of the positions bulletined represent jobs requiring intensive

training and for the most part require accounting experience. From the beginning of the strike the Railway has endeavored to secure additional qualified employes to fill these positions but has been unable to do so. Although the lack of adequate accounting personnel will not immediately stop the running of any trains, no railroad can continue to operate for any appreciable period without adequate accounting procedures. Moreover, regular reports are required by the Interstate Commerce Commission and various other governmental agencies which cannot be prepared unless the exempt employes continue to perform this work.

From the beginning of the strike, employes hired by the Railway or who returned to work were subjected to extensive harassment, abuse and physical violence. "Scab Lists" were circulated containing the names and telephone numbers of the employes, and the employes of the Railway were repeatedly called at all hours of the day or night and

they, and their families, were subjected to violent and
 360 abusive language and harassment consisting of shots being fired into their homes, paint being thrown on their houses and automobiles, automobile tires slashed, bricks thrown through windows and through wind shields of their automobiles. For this reason, the Railway has declined to publish the names of the current employes by posting for public inspection, or distributing copies of seniority rosters to the various organizations. The Railway feels an obligation to its present employes to take whatever reasonable steps it can to protect them from harassment and abuse. The Railway has stated to the Court that it will furnish seniority lists to the various organizations with the request that the recipient officials be subject to the Order of the Court to use the names of the present employes only for legitimate purposes and that if any misuse of seniority information is made that they be answerable to the Court in contempt.

From the beginning of the strike, returnees have been expelled and fined by the organizations and, even though

many new employes have made application for membership, I am informed that no current employe has been admitted to membership despite numerous applications having been made. For this reason, the Railway believes that the provision respecting the Union Shop Agreements of the various organizations should be modified to provide that no Union Shop Agreement shall be valid, or enforceable until such time as the organization demonstrates that membership is available without discrimination to all present employes.

W. L. THORNTON
W. L. Thornton

SWORN TO AND SUBSCRIBED before me, this 11th day of November, 1964.

W. D. RIDGE
Notary Public, State of Florida at Large.
My commission expires: 9-23-67

361 **Affidavit of Raymond W. Wyckoff, Vice President
and Director of Personnel**

STATE OF FLORIDA }
COUNTY OF ST. JOHNS } ss.

This day personally appeared before me **RAYMOND W. WYCKOFF**, who, being by me duly sworn, deposes and says:

1. My name is **RAYMOND W. WYCKOFF** and I am Vice President and Director of Personnel of Florida East Coast Railway Company.

2. In accordance with the preliminary injunction entered in United States vs. Florida East Coast No. 64-107-Civ-J, I have notified the various organizations of the revocation, cancellation and annulity of my letters of October 30, 1963 and September 9, 1963. Furthermore, I have taken steps to have reinstated the rates of pay, rules and working con-

ditions in existing collective bargaining agreements by re-establishing the rates of pay, holiday pay and vacation eligibility requirements, hours, etc., the bulletining of job descriptions in accordance with existing agreement and advertisement through bulletining procedures of one-hundred and fourteen jobs which the various Department heads advised me were immediately required to effect compliance with existing collective bargaining agreements.

3. Because of the lack of qualified personnel it has been necessary since the commencement of the strike to utilize the personnel available to perform whatever work is required that they are qualified to perform without regard to strict craft lines. In the same manner it has been necessary to permit and require exempt supervisory personnel to perform scope work, in part because of the lack of qualified scope employees and in part because of the necessity for the use of employees not fully qualified in the work involved and to work with them in the course of their on the job training which requires that the supervisors perform work they are not qualified to perform.

362 4. The employment of new employees, most of whom were not at the time of employment qualified craftsmen or journeymen under craft rules, has resulted in the employment of a larger number apprentices or trainees than normally permitted by various craft agreements.

5. The shortage of qualified employees has also required that scope foremen perform work of the craft which they supervise. As has been true with exempt supervisors, foremen have been, and are now, required to perform work of the craft in the course of training new employees as well as performing, in many instances, work which they are the only available qualified persons to perform.

6. Because of the lack of qualified employees, Florida East Coast has, since the commencement of the strike, been

required to contract for the performance of certain work which was previously performed by its own employees. Such contracting out has involved Maintenance of Way and Signal Department work which was contracted out from the beginning of the strike. Some Maintenance of Way work contracted out from the beginning of the strike has recently been resumed by the Florida East Coast with the acquisition of new equipment with which to perform this work. In the main, however, Maintenance of Way work contracted out from the commencement of the strike is still being contracted out because of the lack of available personnel to perform it. In the Signal Department, installation of CTC, for example, had to be contracted out because of the lack of qualified employees to install this new equipment.

7. The one-hundred and fourteen jobs bulletined represented only the immediate requirement to permit full compliance with existing collective bargaining agreements. These positions must be filled before other positions would be available, for example, qualified foremen are necessary before track maintenance now being contracted out can be performed by Florida East Coast. Unless and until qualified supervision is available, the accompanying laborers and unskilled or semiskilled employees cannot be used. Seasonal requirements will also affect the additional employees required to comply fully with existing collective bargaining agreements.

363 8. Only three bids from the striking employees were received in response to the one-hundred and fourteen positions advertised and one of these bidders was not qualified for the position she bid for. Without these additional employees Florida East Coast cannot comply fully with existing collective bargaining agreements with respect to the matters mentioned above, that is, craft and seniority district restrictions, performance of scope work by exempt and non-exempt supervisors, apprentice ratios and ap-

prentice age limitations. If required to attempt to work only in strict accordance with existing collective bargaining agreements despite the lack of qualified employes, Florida East Coast would be compelled to reduce service to the public by not less than 30 to 50%. The reduction would not, in the sense, represent an immediate reduction of the maximum but would, in a very short time, require such reduction. The reason for this being that some work, such as maintenance of way and maintenance of equipment could be deferred for a short period of time but within a very short period the effect of the lack of required inspection, maintenance and repair would seriously disrupt all service. Quite possibly, if the Railway were not able to use supervisors to perform various jobs which are essential to the continued operation of the railroad, the effect of the Order of October 30 could be to stop the operation of the railroad immediately and completely.

9. From the commencement of the strike, Florida East Coast has hired and trained new employes as repidly as possible. A total of 474 non-operating craft applicants were processed during the period January 1-October 31, 1964. The jobs requiring least skill and experience were, and are, the most readily filled. The problem of maintaining an even employment rate is the training time required. For example, as indicated in the various craft agreements, the normal training time in most of the crafts is four years. In hiring new employes since the commencement of the strike, few fully qualified craftsmen have been available, and the available applicants have

364 possessed widely varied degrees of skills and experience. With the supervision available only a limited number of persons can be trained at a given time. Consequently, both the limited number of qualified applicants possessing a reasonable degree of experience in the various crafts, together with the limited number of qualified supervisors to direct their training and work, has severely limited the number of employes Florida East

Coast has been able to employ and train. By way of illustration, when one new employe is hired, he can work under the direct supervision of a foreman and the foreman can by working with him see that the work is properly performed, perform such portions as the trainee is not qualified to perform, and as his experience expands, maintain a close supervision over his work. Because these new employes have been largely unqualified as craftsmen, it has not been possible to "turn them loose" without the continued close supervision and control of the supervisor with the supervisor continuing to perform various work the new employe is not qualified to perform. Consequently, when the second person in the same craft is employed, he requires intensive supervision and direction and the first employe while possessing some skills and having attained a certain proficiency still requires more than normal supervision and direction and because he is not yet fully qualified, cannot perform all duties of the craft which the supervisor must continue to perform. As each additional craftsman is added, the same problem has continued and because, in most of the crafts there have been few, if any, fully qualified craftsmen, the Railway has necessarily had to limit the number of persons employed in accordance with its ability to train them. The modifications requested are necessary for the following reasons:

1. *Craft and Seniority District Restrictions.* As indicated, since the commencement of the strike, Florida East Coast has had no alternative as a result of the lack of qualified employes but to use such personnel as it has available to perform such tasks as they are qualified to perform without regard to strict craft lines or seniority district restrictions. For example, an employe who
 365 is classified as an electrician may also be a qualified welder, or may be qualified to do other work of a carman. When welding is required, he has been used to weld or when his services to perform other work as a carman

were required he has been used in such capacity. Similarly, the skills of a clerk working at a point where two seniority districts are located are utilized, if necessary, in both seniority districts. Because of the almost total lack of response to the jobs advertised pursuant to the order of the Court FEC must continue to utilize the services of the employes it has available to perform the jobs they are qualified to perform.

2. *Scope Work by Supervisors.* As indicated, supervisors have been, and are now, being required and permitted to perform craft work both because of the lack of qualified scope employes to perform it and because of the necessity for these supervisors to work with new employes who are largely unqualified and who must be trained as they work.

3. *Apprentice Ratio.* The lack of qualified craftsmen has required the hiring of employes not fully qualified which in turn has resulted in a disproportionate ratio of apprentices and trainees to journeymen.

4. *Apprentice Maximum Age Limitation.* Some of the craft agreements contain limitations on the maximum age of individuals entering apprenticeship programs. Because of the severe shortage of qualified employes, Florida East Coast has been compelled to employ persons not fully qualified as apprentices at various levels depending upon their qualifications and experience. Strict compliance with the apprentice maximum age limitation will further limit Florida East Coast's ability to hire and train qualified employes.

5. *Scope Work by Foremen.* As was indicated above, Florida East Coast has had to permit and require non-exempt foremen to perform scope work of the craft they supervise. This has been required by the lack of qualified journeymen and by the necessity for working with largely unqualified employes in the course of their on the job training.

366 6. *Contracting.* The contracting out of work is not prohibited by any of the agreements and much work has always been contracted out. Since the strike, however, Florida East Coast, has had to contract out work it previously performed, such as maintenance of way and signal work. Florida East Coast believes there is no limitation on its right to do so because there are no qualified employes available; however, to avoid any contention that the Florida East Coast is not complying with the Order of the Court because of this practice, a specific modification is requested with regard to this practice.

The contracting out of work has been required since the commencement of the strike by the lack of qualified personnel. Defendant must continue to contract out such work where it has no qualified employes available.

7. *Security.* Since the commencement of the strike, defendant has been required by the numerous acts of sabotage, vandalisim and harassment including nine dynamitings, two attempted dynamitings, numerous instances of interference with switches, obstructions on tracks, attempted derailments, etc., to institute and maintain various security measures essential to the protection of its plant equipment and property. The only portion of this work covered by any agreement is the work of bridge tenders, and since the commencement of the strike this work, as well as all other measures relating to security, has been performed by supervisory employes or has been contracted out. Defendant must continue to perform this work and must perform it outside any existing agreement for the duration of the strike.

8. *Seniority Rosters.* Defendant is entirely willing to provide upon request seniority information required for the policing of the various collective bargaining agreements. Because of the past harassment of employes working during the period of the strike, defendant has not furnished copies of seniority rosters. Defendant is en-

tirely willing to furnish such seniority rosters provided only that it requests the Court, by Order, to provide
 367 that they shall be used only for the legitimate policing of agreements and not for harassment or annoyance of employes now working.

9. *Union Shop.* As has been demonstrated, union membership is not available under the terms of the various union shop agreements, the agreement is not enforceable as to any employe with respect to whom membership is not available. Unless the Order of the Court is modified, present employes will be subjected to continued uncertainty and the dilemma of attempting to comply by asking for membership which is not available to them. Some organizations have refused to supply application forms, some have accepted applications but have not acted on the applications, some have expelled former members, some have held checks of members who have returned to work without either cashing the check or returning it. In not one instance has any present employe, so far as I have been informed, been admitted to membership by any organization although, to my personal knowledge many have made application.

R. W. WYCKOFF

R. W. Wyckoff

SWORN TO AND SUBSCRIBED before me, this 11th day of November, 1964.

W. D. RIDGE

Notary Public

State of Florida at Large

My Commission expires:

9-23-67

Motive Power

STATE OF FLORIDA

COUNTY OF ST. JOHNS

22.

who, being by me duly sworn, deposes and says:

1. My name is H. E. Hales, and I am General Superintendent Motive Power, Florida, East Coast Railway Company.

2. Upon the entry of the Order in this case, I bulletined 52 jobs immediately required by my Department to permit full compliance with existing collective bargaining agreements. Only one (1) bid was received from the striking employees in response to these bulletins.

3. The rates of pay, terms and conditions of employment in existing bargaining agreements have been reinstated except in the following respects:

(a) Since the commencement of the strike we have had to use excepted supervisors to perform scope work. Some supervisors spend a relatively small percentage of their time in the performance of such work, while others spend a majority of their time in the performance of scope work. This has been and is still, necessary because of the lack of qualified craftsmen and scope supervisors and because of the necessity of these exempt supervisors working with new employes, who are largely unqualified. Even where employes have become fully qualified in certain phases of the work

369 they perform, they are not fully qualified in all
phases in many instances and work for which they
are not so qualified must still be performed by exempt
supervisors.

(b) Scope foremen have been, and still are, required to perform work of the craft which they supervise for

the same reasons as indicated above with respect to the excepted supervisors.

(c) Some of the craft agreements contain a maximum age limitations on apprentices. Since commencement of the strike, Florida East Coast has been required to employ persons not fully qualified under craft rules and for the most part totally inexperienced in railroad work. Consequently, they have had to be placed in the apprenticeship program at various levels, depending upon their qualifications and experience. In some instances the persons have exceeded the age limitations. Based on our experience it is apparent that this practice will have to continue because of the almost total lack of availability of fully qualified craftsmen with railroad experience.

(d) The lack of qualified craftsmen and the necessity for hiring persons not fully qualified under craft rules has resulted in a higher ratio of apprentices, or trainees to qualified craftsmen than permitted by various agreements. Florida East Coast must continue this training if it is to ultimately have sufficient employees qualified by craft rules.

370 (e) Since commencement of the strike, the Florida East Coast has had to use the available personnel to perform whatever duties they are qualified to perform. We have in my Department many employees who are qualified machinists, for example, who are also qualified to perform the work of carmen or other crafts. Where the carmen skill is required and no other person is available to perform the work we have necessarily used the machinist to perform this work. Craft lines cannot be strictly observed unless and until sufficient qualified employees are available to perform it.

4. It is difficult to assess accurately the immediate impact on the operation of my Department if operations must be performed only in strict accordance with existing agreements. Exempt and scope supervisors must be permitted to perform certain scope work or the Railroad will be left totally without various essential skills necessary to the operation of this Department, including car inspectors, railroad Diesel mechanics, railroad Diesel electricians, etc., without which the Railroad cannot continue to operate. We have endeavored since the commencement of the strike to secure or train employes for such work, and such efforts are continuing, but the fact remains that at the moment we do not possess and have been unable to acquire such employes.

In like manner, the use of available employes to perform work across craft lines has been the only way the Railway has been able to supply the deficiency of required skills and such limitations would prevent the performance of essential work. Overall my Department is now approximately
 371 30% short of the personnel required to permit full compliance with the agreements. The deficiency in personnel has been, and still is, being supplied by the use of supervisors both excepted and non-excepted and the performance of work by existing employes across craft lines. If we were not permitted to operate in this manner, our operations would have to be curtailed accordingly and while this overall curtailment would probably not cause an immediate reduction in service, it would have this result very shortly as the maintenance and repair of locomotives and rolling stock would be deferred. The performance of service must be reduced in accordance with the ability of the Railroad to provide necessary inspections, maintenance and repair of equipment, the standard of which is now prescribed by several Federal Laws. In this regard, for example, each locomotive must undergo monthly, quarterly, semi-annual and annual inspections, and failure to complete such inspections and repair work as required

by the Locomotive Inspection Act, Safety Appliance Act and other existing statutes prevents the further use of such locomotive or equipment. The reduction of our ability to perform the work by 30%, or a prohibition from using our personnel, except as required by the agreements, would prevent adequate maintenance and repair of locomotive and rolling stock as compared to the rate of maintenance required to sustain the equipment from general rapid depreciation.

Requisite and specified heavy maintenance to our motive power equipment could be contracted to outside parties at considerable additional cost, and heavy repairs to freight train cars could be contracted to shops or works of private car lines. The Railway must be permitted to
 372 perform the work in the manner now existing, or contract it out, or it cannot operate.

H. E. HALES

H. E. Hales

SWORN TO AND SUBSCRIBED before me, this 11th day of November, 1964.

W. D. RIDGE

Notary Public, State of Florida at Large.
 May commission expires: 9-23-67

373 **Affidavit of H. E. Webb, Superintendent
 Communications & Signals**

STATE OF FLORIDA }
 COUNTY OF ST. JOHNS } ss.

This day personally appeared before me H. E. Webb, who being by me duly sworn, deposes and says:

1. My name is H. E. Webb, and I am Superintendent Communications and Signals, Florida East Coast Railway Company.

2. At the present time the Florida East Coast has no signal repair shop and does not have available qualified personnel to perform such work.

3. In accordance with established practice which existed prior to the strike, the Company has, in the absence of a signal repair shop, been compelled to resort more extensively to unit exchange of equipment.

4. The Florida East Coast is in the process of converting its 4400-volt line to a 220-volt line. Because of lack of sufficient qualified personnel, most of this work has been contracted out, and the work is now largely complete.

5. The Florida East Coast is installing C.T.C. Because of the lack of qualified personnel since the commencement of the strike, we have had to contract out the installation of this new equipment. Our personnel, even if now available for work, would not immediately be qualified to perform this work since it involves entirely new equipment with which they have had no familiarity.

6. Since the commencement of the strike we have hired and trained new employes as rapidly as possible. We have been unable to secure sufficient qualified craftsmen and have necessarily had to train largely unqualified employes. We are very limited in the number of employes we can train by the lack of qualified supervisory personnel to provide both the "on-the-job" training and at the same time perform necessary maintenance of signals which they, because of the lack of qualified employes, are the only qualified persons available to perform.

7. The Florida East Coast does not have available the personnel to operate its Communications and Signals Department except in the manner it is now operating. Communications and signals are essential to the continued operation of the Railroad.

8. New equipment and better tools, elimination of high voltage transformers, etc. will reduce the overall require-

ments of the Communications and Signals Department by approximately one-half over pre-strike requirements. However we now have about one-half of those employes.

9. Unless the Railway continues to operate with the personnel available in the manner it is now operating, maintenance of communications and signals will be paralyzed and the continued operation of the entire railroad will be seriously crippled.

H. E. WEBB

H. E. Webb

SWORN TO AND SUBSCRIBED before me, this 11th day of November, 1964.

W. D. RIDGE

Notary Public, State of Florida at Large.
May commission expires: 9-23-67

375

Filed Nov. 12, 1964

**Application of Defendant for Approval of
Employment Practices**

Pursuant to the preliminary injunction entered in this action on October 30, 1964 defendant Florida East Coast Railway has:

(a) revoked, cancelled and annulled its letters of October 30, 1963 and September 9, 1963 purporting to put into effect changes in rates of pay, rules and working conditions as contained in defendant's notices of September 24, 1963 and July 31, 1963, respectively.

(b) reinstated the rates of pay, rules and working conditions as embodied in existing collective bargaining agreements including:

1. strict compliance with rates of pay, hours, etc. embodied in existing collective bargaining agreements.

2. holiday pay and vacation eligibility requirements and payments in accordance with existing collective bargaining agreements.

3. bulletining of job descriptions in accordance with existing collective bargaining agreements.

4. the advertising through bulletining procedures of one-hundred and fourteen jobs immediately required to effect compliance with existing collective bargaining agreements with respect to craft restrictions, performance of scope work by supervisors, apprentice ratios, performance of work by non-exempt foremen.

376 Defendant received a total of three bids, one of whom was not qualified for the position bid upon. In other words, one-hundred and twelve of the additional positions immediately required were not bid upon by any qualified striking employes, and in fact, General Chairmen of five of the eleven striking cooperating non-operating unions replied in writing, that they were instructing their members not to respond to these bulletins. Copies of these letters are attached as defendant's exhibits 1 through 14.

Defendant therefore requests that the Court's Order of October 30 requiring compliance with existing collective bargaining agreements be modified in the following respects, for the reason that the following employment practices are reasonably necessary to the effectuation of defendant's right to continue service under strike conditions:

1. Defendant shall not be deemed in violation of any existing collective bargaining agreement for failure to observe craft or seniority district restrictions.

2. Defendant shall not be deemed in violation of any existing collective bargaining agreement by requiring and permitting supervisors to perform craft work so long as it does not have sufficient qualified personnel.

3. Defendant shall not be deemed in violation of any existing collective bargaining agreement by exceeding the

apprentice and/or trainee ratios or maximum age limitations contained in any such agreement.

4. Defendant shall not be deemed guilty of violating any existing collective bargaining agreement by permitting and requiring non-exempt foremen to perform scope work of the craft they supervise so long as defendant does not have sufficient qualified personnel.

5. Defendant shall not be deemed in violation of any existing agreement, assuming for the purpose of this application only that any limitation exists, which defendant expressly denies, by virtue of the contracting out of work which it does not have personnel available to
377 perform.

6. The provisions of the Maintenance of Way Agreement shall not limit in any way defendant's right to perform the work of bridge tender by supervisory or contract empolyes, during the continuance of the strike.

7. Defendant shall be required to furnish seniority rosters only upon the expressed order of this Court conditioning receipt of such rosters by the general chairman or other designated official of each organization requesting such lists that the names of present employees will be used only for the legitimate policing of its collective bargaining agreement and that if any misuse of the information is made, such official shall be answerable to the Court in contempt.

8. That the union shop provisions of each of the collective bargaining agreements be declared void and unenforceable as to new employees hired since January 23, 1963, or as to returnees unless and until the Organization, including both the local and international, demonstrates that membership is available to all such new employees or returnees without discrimination and that these employees shall not have less than thirty days from the date of such notification of the availability of union membership to apply for such membership.

The foregoing modifications of existing collective bargaining agreements are necessary to permit the continued performance of service the railway is now affording the public. Defendant cannot comply with the existing collective bargaining agreements without the above required modifications without drastically reducing service it is now rendering to the public. Unless the above requested modifications are granted, it will be necessary to reduce present service by not less than 30 to 50%.

WHEREFORE, defendant prays:

(A) That the Order of October 30, 1964 be modified to permit defendant to operate without observing strict
 378 craft lines or seniority districts; to permit exempt and non-exempt supervisory personnel to perform craft work; to continue to employ necessary apprentices and trainees without regard to ratios limiting the use of such apprentices and trainees; to continue to hire qualified apprentices and trainees without regard to maximum age limitations; to continue present contracting out of work with respect to which it does not have qualified personnel to perform; to continue to perform the work of bridge tenders with supervisory employees or by contracting out such work; to furnish seniority lists only upon order of the Court which will protect the present employees from harassment or abuse and limiting use of seniority lists to legitimate purposes of policing collective bargaining agreements; and to declare union shop agreements void and unenforceable as to employees now working, unless and until, each organization which seeks to enforce its union shop agreement demonstrates that membership is available, without discrimination, to all present employees.

(b) That the Order of the Court of October 30, 1964 be temporarily stayed and enjoined with respect to the provisions set forth in paragraph (A) above pending hearing and determination of this application.

(C) Defendant be granted such further and other relief as to the Court may seem just and proper.

Respectfully submitted,

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonville, Florida

Of Counsel:

Attorneys for Defendant

SEPTOE & JOHNSON
1100 Shoreham Building
Washington, D. C. 20005

379 STATE OF FLORIDA }
 COUNTY OF ST. JOHNS } ss.

Before me, the undersigned authority, personally appeared R. W. WYCKOFF, who, being first duly sworn, deposes and says: That he is Vice President and Director of Personnel of Defendant, Florida East Coast Railway Company, that he has read the foregoing application for approval of employment practices and that the facts stated therein are true to his information and belief.

R. W. WYCKOFF
R. W. Wyckoff

Sworn to and subscribed before me this 11th day of November, 1964.

W. D. RIDGE
Notary Public
State of Florida At Large

My commission expires:
9-23-67

Filed Nov. 12, 1964

Notice of Hearing on Motion for Stay of Portion of Order

TO: Mr. William J. Hamilton, Jr.
Assistant United States Attorney
Post Office Building
Jacksonville, Florida
Messrs. Howard E. Shapiro and
Peter B. Edelman, Attorneys
Department of Justice
Civil Division
Washington, D. C.
Attorneys for Plaintiff

Messrs. Neal Rutledge and
Allen Rutledge, Attorneys
Rutledge and Milledge
601 Flagler Federal Building
111 Northeast First Street
Miami, Florida, 33132
Attorneys for Intervenor

PLEASE TAKE NOTICE that the undersigned will call up its motion for stay of portion of Order before the Honorable Bryan Simpson, Chief Judge United States District, at the United States Court House, Jacksonville, Florida, at 9:30

A.M., November 13, 1964, or as soon thereafter counsel may be heard.

Please govern yourselves accordingly.

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonville, Florida

Of Counsel: *Attorneys for Defendant*

STEPTOE & JOHNSON
1100 Shoreham Building
Washington, D. C. 20005

381

Filed Nov. 12, 1964

Order

Motion for Stay of Portion of Order of October 30, 1964, pending hearing on Defendant's Application for Approval of Employment Practices granted. Hearing for 12:00 o'clock noon, November 13, on Notice of Motion for Stay cancelled.

Hearing on Defendant's Application for Approval of Employment Practices set for November 20, 1964, at 2 o'clock P. M. in the United States Courthouse, Jacksonville, Florida.

DONE AND ORDERED at Jacksonville, Florida, this 12th day of November, 1964.

BRYAN SIMPSON
Chief Judge
United States District Court

383

Filed Nov. 19, 1964

Order

For good cause shown, it is

ORDERED that the hearing on Defendant's application for approval of employment practices, previously set herein for November 20, 1964, at 2:00 o'clock P. M., in the U. S. Courthouse, Jacksonville, Florida, is hereby re-set for 9:30 A. M., Monday, November 30, 1964.

The stay of portions of this Court's Order of October 30, 1964, previously entered herein, is continued until 9:30 A. M., Monday, November 30, 1964.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 19th day of November, 1964.

BRYAN SIMPSON

Chief Judge

United States District Court

384

Filed Dec. 3, 1964

Order

This cause having come on for further hearing on the Application of Defendant for Approval of Employment Practices pursuant to Paragraph 1(e) of the Preliminary Injunction entered herein on October 30, 1964; and the Court having received testimony and other evidence in open court and heard argument of counsel, the Court finds that in order to enable the Defendant to effectuate its right of self help during the strike which has been in progress since January 23, 1963, certain departure from the collective bargaining agreements presently in force on Defendant's property, as hereinafter set forth, are reasonably necessary; and further finds that there is no showing of reasonable necessity for departure from said col-

lective bargaining agreements in any other respect; and it is, therefore,

ORDERED :

1. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement for failure to observe craft or seniority district 385 restrictions, is denied.

2. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by requiring or permitting supervisors to perform craft work, is denied, except that until March 31, 1965, Defendant may man the positions of one Train Dispatcher and two Rate and Division Clerks with supervisory personnel, and that Defendant may thereafter continue this practice only upon a showing of reasonable necessity.

3. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by exceeding the apprentice and/or trainee ratios or maximum age limitations contained in any such agreement, is granted.

4. Defendant's request that it shall not be deemed in violation of any existing collective bargaining agreement by permitting or requiring non-exempt foremen to perform scope work of the craft they supervise, is denied.

5. Defendant's request that it shall not be deemed in violation of any existing agreement, by virtue of the contracting out of work which it does not have personnel available to perform, is denied except that it may continue to contract out work in areas where it is presently doing so, as shown in this record, to-wit: the performance of the work of one Bridge Maintenance and Repair Gang and installation and maintenance of the Centralized Traffic Control System.

6. Defendant's request to perform the work of
 386 Bridge Tender by supervisory or contract employees
 during the continuance of the strike, is denied except
 that Defendant may continue to use supervisory or con-
 tract employees in the position of Bridge Tender until
 March 31, 1965.

7. Defendant's request that its obligation to furnish
 seniority rosters be conditioned upon an Order subjecting
 the General Chairman, or other designated official request-
 ing such lists, to sanctions for contempt in the event of
 their misuse, is denied.

8. Defendant's request that the union shop provisions of
 each collective bargaining agreement be declared void and
 unenforceable as to new employees hired since January
 23, 1963, is denied; and it is

FURTHER ORDERED that Defendant shall have to and
 including December 10, 1964, in which to bring itself into
 full compliance with this Court's Preliminary Injunction
 of October 30, 1964, and this Order.

DONE AND ORDERED at Jacksonville, Florida, this 3rd day
 of December, 1964.

BRYAN SIMPSON
Chief Judge
 United States District Court

387 Filed Dec. 4, 1964

**Notice of Appeal to Court of Appeals Under Rule 73(b), 28
 U.S.C. § 1291, 1292, 1651, and 29 U.S.C. § 110**

NOTICE IS HEREBY GIVEN that Florida East Coast Rail-
 way Company, defendant above named, hereby appeals to
 the United States Court of Appeals for the Fifth Circuit
 from the Order entered in this action on October 30, 1964,
 granting a preliminary injunction against defendant, and

from the Order entered on December 3, 1964, denying Approval of Employment Practices, application for which was made by defendant pursuant to Paragraph 1(e) of the Preliminary Injunction entered herein on October 30, 1964.

WILLIAM B. DEVANEY
William B. Devaney
1100 Shoreham Building
Washington, D. C. 20005

J. TURNER BUTLER
J. Turner Butler
814 Florida Title Building
Jacksonville, Florida 32202

Attorneys for Defendant

389

Filed Dec. 4, 1964

**Designation of Record for Preliminary Hearing in the
Court of Appeals**

Defendant, Florida East Coast Railway Company, is filing a Motion for Stay pending appeal of the Order of the Court entered on December 3, 1964, denying approval of employment practices. Pursant to Rule 23(4) of the Rules of the United States Court of Appeals for the Fifth Circuit, defendant requests that the Clerk transmit to the Clerk of the Court of Appeals the following original papers:

1. Findings of Fact and conclusions of law entered on October 30, 1964.
2. Preliminary Injunction entered on October 30, 1964,
3. Application of Defendant for approval of Employment Practices.
4. Motion for Stay of Portion of Order with attached affidavits of W. L. Thornton, President; Raymond W. Wyckoff, Vice President and Director of Personnel; H. E.

Hales, General Superintendent Motive Power; and H. E. Webb, Superintendent Communications and Signals.

5. Notice of Hearing on Motion for Stay at 9:30 A.M., November 13, 1964.

390 6. Telegraphic notice of change of time for hearing on Motion to Stay from 9:30 A.M. to 12 noon, November 13, 1964.

7. Order entered November 12, 1964 granting Stay of Portion of Order of October 30, 1964, pending hearing on Defendant's Application for Approval of Employment Practices, cancelling hearing on Notice of Motion for Stay, and setting hearing on Application for November 20, 1964 at 2:00 P.M.

8. Order entered on November 19, 1964, resetting hearing on Application for 9:30 A.M., November 30, 1964, and continuing stay previously entered.

9. Defendant's Exhibits W through OO.

10. Transcript of Hearing of May 26-28, 1964.

11. Transcript of such portion of the Hearing of November 30, December 1, and 2, 1964, as the Reporter can make available for this Motion (the Reporter has indicated that he can transcribe only Mr. Thornton's testimony and the argument of Counsel).

12. Order entered December 3, 1964, denying Application for Approval of Employment Practices.

13. Docket entries.

14. This designation of Record for Preliminary Hearing.

WILLIAM B. DEVANEY
William B. Devaney
Attorney for Defendant

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Filed Dec. 7, 1964

Bond On Appeal

KNOW ALL MEN BY THESE PRESENTS That we, Florida East Coast Railway Company, a corporation, as principal, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto the United States of America in the sum of **Two HUNDRED FIFTY (\$250.00) DOLLARS** to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

SEALED with our seals and dated this 7th day of December, 1964.

WHEREAS, on October 30, 1964, an Order was entered in the above styled action granting a preliminary injunction against the said Florida East Coast Railway Company and on December 3, 1964, an Order was entered in the above styled action denying Approval of Employment Practices, application for which was made by defendant pursuant to Paragraph 1 (e) of the Preliminary Injunction entered on October 30, 1964;

WHEREAS, the said Florida East Coast Railway Company has duly filed a Notice of Appeal from said Orders of October 30, 1964, and of December 3, 1964, to the United States Court of Appeals for the Fifth Circuit,

Now, **THEREFORE**, the condition of this bond is
392 such that if the said Florida East Coast Railway Company shall pay all costs if the appeal is dismissed or the orders affirmed, or such costs as the appellate court may award if the orders are modified, then this

obligation to be void, otherwise, to remain in full force and effect.

FLORIDA EAST COAST RAILWAY COMPANY

By R. W. WYCKOFF

*Its Vice President and
Director of Personnel*

Principal

UNITED STATES FIDELITY & GUARANTY
COMPANY

By RAYMOND C. WINSTEAD

Its Attorney-in-Fact

Surety

393

(Certified Copy)

General Power of Attorney

No. 65951

Know all Men by these Presents:

That United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland, and having its principal office at the City of Baltimore, in the State of Maryland, does hereby constitute and appoint Cooper M. Cubbedge and Raymond C. Winstead of the City of Jacksonville, State of Florida its true and lawful attorneys in and for the State of Florida for the following purposes, to wit:

To sign its name as surety to, and to execute, seal and acknowledge any and all bonds, and to respectively do and perform any and all acts and things set forth in the resolution of the Board of Directors of the said United States Fidelity and Guaranty Company, a certified copy of which is hereto annexed and made a part of this Power of At-

torney; and the said United States Fidelity and Guaranty Company, through us, its Board of Directors, hereby ratifies and confirms all and whatsoever either the said Cooper M. Cubbedge or the said Raymond C. Winstead may lawfully do in the premises by virtue of these presents.

In Witness Whereof, the said United States Fidelity and Guaranty Company has caused this instrument to be sealed with its corporate seal duly attested by the signatures of its Vice-President and Assistant Secretary, this 16th day of May, A. D., 1952.

UNITED STATES FIDELITY AND GUARANTY
COMPANY.

(Signed) By J. D. WILLIAMS

Vice-President

(SEAL)

(Signed)

WILLIAM J. McFEELY

Assistant Secretary

STATE OF MARYLAND }
BALTIMORE CITY } ss:

On this 16th day of May, A. D., 1952, before me personally came J. D. Williams, Vice-President of the United States Fidelity and Guaranty Company and William J. McFeely, Assistant Secretary of said Company, with both of whom I am personally acquainted, who being by me severally duly sworn, said that they reside in the City of Baltimore, Maryland; that they said J. D. Williams and William J. McFeely were respectively the Vice-President and Assistant Secretary of the said United States Fidelity and Guaranty Company, the corporation described in and which executed the foregoing Power of Attorney; that they each knew the seal of said corporation; that the seal affixed to said Power of Attorney was such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that they signed their names thereto by

like order as Vice-President and Assistant Secretary, respectively, of the Company.

My commission expires the first Monday in May, A. D., 1953.

(SEAL)

(Signed) M. G. LEE

Notary Public.

STATE OF MARYLAND }
BALTIMORE CITY } ss:

I M. Luther Pittman, Clerk of the Superior Court of Baltimore City, which Court is a Court of Record, and has a seal, do hereby certify that M. G. Lee, Esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was at the time of so doing a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and sworn and authorized by law to administer oaths and take acknowledgments, or proof of deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily believe the signature to be his genuine signature.

In Testimony Whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 16th day of May, A.D., 1952.

(SEAL)

(Signed) M. LUTHER PITTMAN
*Clerk of the Superior Court of
Baltimore City*

That Whereas, it is necessary for the effectual transaction of business that this Company appoint agents and attorneys with power and authority to act for it and in its name in States other than Maryland and in the Territories of the United States and in the Provinces of the Dominion of Canada and in the Colony of Newfoundland

Therefore, be it Resolved, that this Company do, and it hereby does, authorize and empower its President or either of its Vice-Presidents in conjunction with its Secretary or one of its Assistant Secretaries, under its corporate seal, to appoint any person or persons as attorney or attorneys-in-fact, or agent or agents of said Company, in its name and as its act, to execute and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performances of contracts other than insurance policies and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings, or by law allowed, and

Also, in its name and as its attorney or attorneys-in-fact, or agent or agents to execute and guarantee the conditions of any and all bonds, recognizances, obligations, stipulations, undertakings or anything in the nature of either of the same, which are or may by law, municipal or otherwise, or by any Statute of the United States or of any State or Territory of the United States or of the Provinces of the Dominion of Canada or of the Colony of Newfoundland, or by the rules, regulations, orders, customs, practice or discretion of any board, body, organization, office or officer, local, municipal or otherwise, be allowed, required or permitted to be executed, made, taken, given, tendered, accepted, filed or recorded for the security or protection of, by or for any person or persons, corporation, body, office, interest, municipality or other association or organization

whatsoever, in any and all capacities whatsoever, conditioned for the doing or not doing of anything or any conditions which may be provided for in any such bond, recognizance, obligation, stipulation, or undertaking, or anything in the nature of either of the same.

I, H. G. Sachse an Assistant Secretary of the United States Fidelity and Guaranty Company, do hereby certify that the foregoing is a full, true and correct copy of the original power of attorney given by said Company to Cooper M. Cubbedge and Raymond C. Winstead of Jacksonville, Florida, authorizing and empowering them to sign bonds as therein set forth, which power of attorney has never been revoked and is still in full force and effect.

And I do further certify that said Power of Attorney was given in pursuance of a resolution adopted at a regular meeting of the Board of Directors of said Company, duly called and held at the office of the Company in the City of Baltimore, on the 11th day of July 1910, at which meeting a quorum of the Board of Directors was present, and that the foregoing is a true and correct copy of said resolution, and the whole thereof as recorded in the minutes of said meeting.

In Testimony Whereof, I have hereunto set my hand and the seal of the United States Fidelity and Guaranty Company on (Date) 4th December, 1964.

H. G. SACHSE
Assistant Secretary

395

Filed December 30, 1964

Notice of Appeal to Court of Appeals Under Rule 73(b)

NOTICE IS HEREBY GIVEN that the United States of America, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Order of the United States District Court for the Middle District of Florida (dated October 30, 1964) granting a preliminary injunction against the defendant and the Order of the United States District Court for the Middle District of Florida (dated December 3, 1964) with respect to the application of defendant for approval of employment practices.

EDWARD F. BOARDMAN*United States Attorney*

By **WILLIAM J. HAMILTON, JR.**
William J. Hamilton, Jr.

Assistant United States Attorney

407 Post Office Bldg.

(P. O. Box 59)

Jacksonville, Florida 32201

Attorneys for Plaintiff

No. 64-107-Civil-J

UNITED STATES OF AMERICA

V.

FLORIDA EAST COAST RAILWAY COMPANY

Transcript of Proceedings

Before the HONORABLE BRYAN SIMPSON,
Judge of the above Court,

Commencing at 9:40 o'clock a.m.,
on Tuesday, May 26, 1964

JOSEPH A. SHERIDAN,
Official Reporter.

2

Appointments

For the Plaintiff:

Howard E. Shapiro, Esquire
Department of Justice,
Civil Division,
Washington, D. C.

Peter B. Edelman, Esquire
Department of Justice,
Civil Division
Washington, D. C.

William J. Hamilton, Jr., Esquire
Assistant United States Attorney
Jacksonville, Florida

For the Defendants:

Messrs. Steptoe & Johnson
 1100 Shoreham Building
 Washington 5, D. C.
 By: William B. Devaney, Esquire
 J. Turner Butler, Esquire
 814 Florida Title Building
 Jacksonville, Florida

For the Intervenors:

Messrs. Milledge, Rutledge, Milledge & Simon
 601 Flagler Federal Building
 Miami, Florida
 By: Neal Rutledge, Esquire
 and
 Allan Milledge, Esquire

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5 The Court: Good morning, Gentlemen.

This is No. 64-107, United States against F.E.C. Railway Company, Application for Preliminary Injunction. Are any additional appearances to be noted?

Mr. Hamilton: Yes, Your Honor.

For the United States, in addition to Mr. Shapiro, I believe Your Honor has previously met Mr. Peter B. Edelman, also from the Civil Division.

The Court: Mr. Edelman?

Mr. Edelman: Yes, Sir.

The Court: You are from the Department of Justice?

Mr. Edelman: Yes, sir.

The Court: From the Civil Division?

Mr. Edelman: Yes, sir.

6 The Court: Mr. Milledge, you have a—

Mr. Milledge: Yes, sir.

The Court: —Petition to Intervene here?

Mr. Milledge: We do, on behalf of eleven of the non-operating brotherhoods.

The Court: Are there any other Petitions to Intervene?

Mr. Devaney and Mr. Butler are here on behalf of the defendant Railway Company.

Mr. Devaney: That's correct, Your Honor.

The Court: These gentlemen, are they—

Mr. Milledge: They are—

The Court: —can we classify them in general as Union Chairmen?

Mr. Milledge: And Union officials.

7 The Court: And Union officials. Are they—

Mr. Milledge: Many of them are under subpoena, Your Honor, by—

The Court: There's a big batch of subpoenas duces tecum filed here.

Mr. Milledge: Many of them are here in response to those subpoenas.

The Court: I suppose we might take up the question of the Petition in Intervention first.

You might make what statements you would like to make, Mr. Milledge.

Mr. Milledge: Your Honor, the Complaint filed by the United States of America is somewhat similar to the Complaint which was filed on behalf of the Brotherhood of Railroad Trainmen. Many of the issues are the same.

The intervenors here, or applicants to intervene, are the eleven so-called cooperating non-operating
8 brotherhoods. They are the eleven brotherhoods who are on strike.

The strike that was called on January 23, 1963, was called by these eleven non-operating brotherhoods who here seek to intervene.

The purpose of the lawsuit brought by the Government is to vindicate the processes of the Railway Labor Act as it applies to the rules, rates of pay and working conditions of the various non-operating crafts.

We feel that the non-operating crafts have a vital, direct interest; that whatever ruling is made here, even if it were not a res adjudicata matter, that is, if we were not parties, it might not be res adjudicata but the effect will be just the same and we have submitted to Your Honor a memorandum which I believe you have received, have you not, sir?

The Court: Yes, sir. It was received in my office on the 22nd.

Mr. Milledge: The Motion to Intervene is filed under Rule 24(a)(2). There is no statute giving a right to
9 intervene here but we feel that we do have, at least under the more recent cases, a right to intervene because there is the possibility that the Government's representation here may be different than the representation by the people directly concerned. And as we set forth in our memorandum, the Government's position is the public interest, where our interest here is a more direct, economic interest and it is possible, as happened in the

Brotherhood of Railroad Trainmen issue, that the Government's position was only a part of the issues.

Now there, they weren't a party but they did file an amicus brief before the Court of Appeals and they—

The Court: That was argued yesterday afternoon, wasn't it?

Mr. Milledge: It was, Your Honor.

The Court: Was the Government permitted to argue in that case?

Mr. Milledge: I don't believe they requested—
10 in any event, they did not orally argue.

The Court: They asked leave to file a brief.

Mr. Milledge: Yes, sir, and that was granted.

But there, they supported two of the issues but took no position on the third, so there is that possibility here also.

The more recent decisions, and there are three of them cited, in which the District Judge decided not to permit intervention; and in the three cases we cite, all within the past ten years, the District Judge was reversed, not because the applicants to intervene would be bound under *res adjudicata* principles but because they had such a direct economic interest in the outcome and were so directly affected that the Courts in all three cases decided that the practical necessities were such that the applicants should have been permitted to intervene.

Two of the cases cited involved unions and the third involved property rights.

Of course, there is an alternate ground for intervention and that is the Court's discretion under Rule 24(b).

11 Certainly what has been raised in our intervenors' complaint raises the same questions of fact and law as the Government's complaint; so clearly it is within your discretion to permit us to intervene, but we urge that because of the practical necessities involved that we should be granted a right to intervene under Rule 24(a)(2).

Now, just in connection with this generally, as Your Honor has already noted, there are—I'm not sure how many, but there are twenty or more—subpoenaes duces tecum outstanding to various people that we represent. And I think that's an additional reason why we ought to be parties here and given that standing, as Your Honor can see by the vastness of what is requested under these subpoenaes, there's going to be quite a bit of difficulty and it might be resolved more easily if we were a party and had the opportunity to object as to materiality rather than to have to have a long argument on a Motion to Quash because of the general fishing nature of these, or the privileged nature of much of what's requested. We might have to argue it on a different basis and it might be more expeditious if we were a party and could present the

12 matter in terms of materiality rather than in terms of either the impossibility of production or privilege on behalf of these various people, as counsel for witnesses.

We respectfully request that Your Honor permit the eleven cooperating non-operating unions to intervene and to participate in this cause as parties.

The Court: What is the position of the Government, Mr. Shapiro?

Mr. Shapiro: The United States has no objection to the granting of the Motion for Leave to Intervene, Your Honor.

The Court: What is the position of the defendant Railway?

Mr. Devaney: Your Honor, we oppose the Motion to Intervene, not because we question what Mr. Milledge has said as to the parties, the unions he is making this application on behalf of, being the real parties in interest in this action. We agree with him that this is true.

13 The basic reason that we object to this intervention goes to the fact that we believe that the complaint itself is improperly brought by the United States, in part because it is not the real party in interest because

there is no case of controversy and, in due course, this issue will be fully presented to Your Honor.

Now, a Petition to Intervene, whatever the rights of the intervenor, must stand or fall with the main action since it is very clear from this action that it is subsidiary to the principal action.

Now, it is also true that these subpoenas duces tecum have been issued in large part because there was no other way, since the action was brought by the United States to obtain the information necessary for the defense of this action, except by issuing these subpoenas duces tecum.

Now, we believe that the intervention here is actually permissive and not as of right, because nothing that Mr. Milledge has indicated really goes to the question that the representation by the United States is not adequate.

Now, in the absence of adequate representation,
14 then the intervention becomes permissive.

Now, as far as the permissive right and discretionary right to permit them to intervene, we believe that it merely complicates the presentation of the case by having additional examination and cross-examination; and unless and until there is some reason that their interests are not being adequately represented, it seems that the Government can and will, if they have properly brought this action, will properly represent the interests of the unions on whose behalf this action is actually based.

So, for that reason, we do not see any reason to add to the complexity of the action by having additional parties who would have the right to cross-examine, the right to call their witnesses. It would merely add, as Mr. Eardley said in December, it would merely add cross-examination on top of cross-examination.

For these reasons, Your Honor, we oppose the Petition to Intervene.

The Court: Anything further?

Mr. Milledge: I think, as a matter of practicality,
15 they have already by issuing these broad subpoenas

duces tecum, they have effectively made us a party and we're going to have to represent them in one capacity or another here, so that I don't think it's going to complicate this issue at all to have us as parties here. And at the present time, we have no intention of calling any witnesses, but we don't intend to complicate the issues, but do feel that we should be present.

And I think there's one other aspect here, that we've already been through one of these law suits before, and I think Your Honor will recall we did nothing there to drag this matter on or unnecessarily bring on witnesses. It was a short and sweet proposition that went straight to the issues. And that will be the same if we are permitted to intervene today.

The Court: It is my view that these petitioners have a right to intervene under Rule 24(a)(2) on the grounds set out in that portion of the Rule that:

16 "Representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action."

It is my further view that if the intervention may not be sustained on that ground, that the permissive intervention under Rule 24(b) should be permitted.

I don't consider that the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. I have the view that this intervention will be of aid to the Court in reaching an orderly and correct decision of the issues involved, rather than detracting from such an effort on the Court's part.

The motion is therefore granted on the provisions of Rule 24(a)(2) and subordinately I express the view that, in any case, it should be granted under Rule 24(b).

Is there some way—I don't know what effort has been made, I know that counsel has been busy with this other case and argument of it before the Court of Appeals yesterday afternoon. I don't know to what extent any agree-

17 ments have been sought, any stipulations as to facts or any effort to shorten the length of either the oral testimony or the documentary evidence. I would hope that there can be some things accomplished along that line. I'm a little dismayed when I pulled this file the other day and saw all these duces tecum subpoenas.

Mr. Shapiro: Your Honor, last night Mr. Devaney, counsel for the Railroad, and I met briefly. Mr. Devaney served me with a copy of the answer for his client. I think he's going to tender it this morning.

The Court: I don't think that's in the file.

The Clerk: No, sir. It was just handed up this morning, Judge.

The Court: All right. It goes right in here.

The Clerk: Yes, sir. These go in first. (Indicating)

The Court: All right.

Excuse me, Mr. Shapiro.

18 Mr. Shapiro: I believe that, in going through the answer and the complaint, a great many issues which might be raised have been eliminated and we will be able to proceed quite rapidly on the basis of the facts alleged, facts submitted.

There are cases where F.E.C. has realleged certain matters in terms different than the way the Government has alleged them, but I think we can go through these documents very rapidly and establish the basic outline of the facts without any necessity for further proof.

The Court: All right, sir.

Mr. Devaney: Your Honor, before we reach this, I wonder if it would not be appropriate at this time to consider the Motion to Stay these proceedings, which we had filed previously and had noticed for hearing this morning.

Now, if Your Honor would prefer to go through this, the answer and the simplification or clarification, before considering the motion, I have no objection. I merely suggest that, since this is a preliminary matter, it might properly be considered first.

19 The Court: This is a Motion to Continue Hearing that you filed on May 11; is that right?

Mr. Devaney: This is—

The Court: At a time when this case was originally set for May 19.

Mr. Devaney: We filed two motions at the time, Your Honor. One was to continue the hearing and the other was a motion to stay the proceedings.

The Court: I would just as soon take that up. I'll take it up now.

Mr. Devaney: The reason for this motion, Your Honor, is that this complaint and the exhibits attached to it indicate quite clearly that the legal issues involved in this case are the same legal issues that were involved in the case that was heard by the Court of Appeals yesterday.

Now, because the issues are the same, even though this action is brought by the United States on behalf
20 of these various unions, we believe that the matter should be held in abeyance until the Court of Appeals decides the case in 21356.

Now, the similarities we've set forth in this motion and some of them, very briefly, are these:

There is a request for an injunction to restrain defendant from operating during the strike, except in accordance with the agreements in effect before the strike, despite the fact that the strike and the withdrawal of manpower made it impossible for defendant to operate under such agreements during the strike.

Now, this was one of the principal issues involved in 21356 and it is an issue which the Court of Appeals in some manner will have to pass upon.

Now, the complaint in this action further asks for an injunction restraining any action under the Section 6 Notice of July 31st, which was the notice of desire to terminate the union shop agreements.

Now again, Your Honor, that was one of the issues involved in the Civil action 64-40, which is Court of Appeals case No. 21356.

Now, the complaint in this case asks for an injunction restraining any action under Section 6
21 Notice of September 24, 1963.

Now, factually this issue was not before the Court in 64-40 because the Brotherhood of Railroad Trainmen had bargained, but the legal issue—that is, the right to put into effect a change in agreement where there is a refusal by the union to bargain—is the same legal issue which was involved in 64-40 with respect to the union shop and, therefore, this legal issue is certain to be affected by the decision in 21356.

Now, this action involves the same basic question of the jurisdiction of the Court. Although other questions are involved additionally, the same basic question of jurisdiction, that is, between the minor and the major dispute argument, is involved in this case as was involved in 64-40. The same question of irreparable harm is involved in this case as was involved in 64-40.

And the same basic question as to the application of the Norris-LaGuardia Act is involved in this case although, again, there are additional variations of it. You have the same problems of conforming to the provisions of
22 the Norris-LaGuardia Act if any relief were to be granted.

Now, this question alone of the application of the Norris-LaGuardia brings to the head the question of irreparable harm.

Now, as Your Honor will recall, on March 14, 1964, in Case 21356, the United States Court of Appeals ordered that the preliminary injunction be stayed, suspended, pending the hearing and determination of the appeal on the merits on May 25th, which was of course yesterday.

Now, because the issues are identical in many respects, we believe that the proceedings should be stayed but, more important, the Court of Appeals specifically found—and if I may, I'll quote their findings in their Order of March 14, in which they said—

The Court: I just wonder. They made a necessary recitation to grant the stay order, but they couldn't have examined this thing in order to enter that order.

Mr. Devaney: In one respect, they did, Your Honor.

The Court: You gentlemen made an emergency
23 application to them and they granted the stay.

Mr. Devaney: That is correct, Your Honor, but the one area and the one issue on which they did make a determination was the question of irreparable harm. And this was their finding and it was after the matter was presented to them on briefs and after full argument before the Court. And they stated in their Order:

"The Court concluding upon consideration of the public interest and a clear showing of irreparable harm that the maintenance of the status quo in the interim will better protect the interests of the respective parties and the general public."

Now, we respectfully submit, Your Honor, that the findings in that case that irreparable harm will be done to the Railroad is applicable to this case. We believe that it's applicable for another reason and that is that the question of the multiplicity of suits was specifically raised

before the Court of Appeals and it was the intention, and we believe the clear language of the Order
24 was intended to prevent any further action involving the same legal issues as were involved in that case until they had heard the matter. And in order to expedite the hearing of the matter, it was specially set for hearing on May 25; and the question of deferring action here is not going to be for any extended period of time, since the Court has obviously indicated already that it has expedited the handling of the case.

We believe that it would be improper to proceed at this time with an action that involved the identical legal issues, some of the same factual contentions are present here as were present in 64-40.

We can see no reason why the case should not be stayed.

There can be no irreparable damage to any of the parties. The decision of the Court of Appeals in 21356, whatever it may be, cannot help but have a direct effect on this case because the issues are the same, so that the decision will have a very important impact on what happens in the further handling of this case.

And for this reason, we have suggested that this case, that the hearing in this case be stayed for a reasonable period after the decision of the Court of Appeals.

Now, we have suggested a period of 30 days after the decision of the Court of Appeals in order to give the plaintiff an opportunity to consider whether any amendments of its complaint would be necessary and give us an opportunity to consider whether any change in our presentation would be necessary. But we merely suggest the time. We believe that any reasonable period of time after the decision would be entirely satisfactory, so far as we are concerned.

Thank you, Your Honor.

The Court: I don't care to hear from you.

The Motion to Stay is denied.

This proceeding may take one of several turns, Gentlemen. It may result in a denial of the issuance of preliminary injunction, in which case we would have this behind us. It may result in a decision by me to grant in whole or in part the temporary injunctive relief sought. If that decision is reached, I certainly then can exercise discretion as to whether to have the injunction take effect immediately or delay it until after the action of the Court of Appeals.

The Government has brought this suit. The Government is down here ready to try it. I put them off. They had it set a week ago, I put it off so as to meet the convenience of the parties to let this application be made here today. There are numerous people that are brought here that would be seriously inconvenienced by having to come

here today and then go back and come back at some indefinite time in the future, after the Court of Appeals has disposed of the other case.

All these decisions lead me to conclude that I should go ahead with the hearing, as scheduled.

Now, if you gentlemen can be analyzing the complaint and the answer as you go along, eliminating disputed questions, maybe that would serve to speed up the evidentiary portions of these proceedings, to have a clear understanding of that.

And I'll hear Mr. Shapiro, or hear you gentlemen jointly, or however you think we can best handle this.

Mr. Shapiro: I thought perhaps the simplest way,
27 Your Honor, would be for the United States to make a brief opening statement and then Mr. Devaney and I could go through the answer and the complaint, indicating what's disputed and what's not.

The Court: All right. Proceed with your opening statement, then.

OPENING STATEMENT BY MR. SHAPIRO

Mr. Shapiro: May it please the Court:

This is a suit by the United States to vindicate the policies of the Railway Labor Act, in particular Sections 2, Seventh, and Section 6 of the Act.

The action is not brought on behalf of any labor unions. It's brought on behalf of the United States because of the Government's serious concern over the effect of this extraordinary situation on the Florida East Coast Railroad on the operation of the Act.

Sections 2, Seventh, and 6 of the Act, as Your Honor knows, forbid a carrier from making changes in rates of pay, rules and working conditions, except in compliance with the procedures of the Act.

28 These procedures call for notice of proposed changes, meetings between the parties, and mediation by the National Mediation Board, if the parties cannot

reach agreement through their own efforts or if meetings are refused, and the services of the Board are invoked within ten days after the last unsuccessful conference.

During the period that the Mediation Board is acting, the parties are required to maintain the status quo until the Board determines that its efforts have been unsuccessful and until the Board has exhausted its efforts to induce the parties to accept arbitration.

Now, I think the complaint and answer will show, Your Honor, that the Florida East Coast has been on strike since January, 1963; that it has hired replacements for the strikers and for those of its employees who will not cross the strikers' picket lines. It has, with the replacements, restored about 95% of its freight operation.

Now, it achieved this, the Government alleged in its complaint, by making agreements with its replacements, individual agreements with its replacements, which departed substantially from the collective bargaining
29 agreements which govern its employees, whether they are replacements or whether they are strikers.

It's the Government's position that the collective bargaining agreements remain in force for all classes or crafts until they are changed in accordance with the procedures of the Act. For example, the strike involving the non-operating organizations is over a notice by the carrier to reduce wages about 20%, and there's no question but that the carrier can act under its notice because all of the procedures of the Act have been exhausted with respect to that strike.

But the carrier here has gone on from there and has made three changes that we are concerned with:

First, it purported to put into effect a set of "Conditions of Employment" which were promulgated formally on September 1st, 1963, without any notice to the labor organizations involved and without any attempt to comply with the provisions of the Railway Labor Act.

Now, I understand from the answer and from the argu-

ment of counsel in the Court of Appeals that, at the present time, the "Conditions of Employment" are not in effect, that they have been superseded in effect by a document entitled "Uniform Working Agreement", which was proposed by this carrier on September 24th, 1963, and served upon 17 labor organizations representing non-operating employees. These organizations include the 11 non-operating organizations currently on strike.

Now, the "Uniform Working Agreement" of September 24, 1963, appears to be substantially the same as the "Conditions of Employment" which the carrier purported to be operating under after September 1st. So that what the carrier did was to take its "Conditions of Employment" of September 1, revised it slightly and turn it into a formal notice under Section 6, which it served.

The dispute over this September 24th "Uniform Working Agreement" was the subject of a timely invocation of the Mediation Board's services and it was docketed by the Board of October 31st, 1963. However, notwithstanding this, on October 30th, 1963, the carrier purported to put the "Uniform Working Agreement" into effect for its non-operating employees, including the International Association of Railway Employees.

I might say that we use this term "non-operating employees", I don't want to prejudice the rights of the International Association of Railway Employees, which I understand has a dispute with the carrier as to whether it's an operating or non-operating organization, so while we may occasionally use this term carelessly, that reservation should be made.

Now, when the Mediation Board received the application, it advised the carrier that it had received it and the F.E.C. told the Board that the unions were not in position to avail themselves of the Mediation Board's services because they had, as they say, refused—as the carrier had refused to bargain. This was a dispute over whether a Court Re-

porter should be present at a conference. The labor organizations did not want to bargain in the presence of the Court Reporter and the carrier did not want to bargain in the absence of a Court Reporter, so the negotiations broke down and the Mediation Board's services were invoked.

It has been the carrier's position from the very beginning of this invocation of the Mediation Board's services that the Mediation Board docketing was of no effect, 32 that the Mediation Board has no jurisdiction, that the carrier was free to resort to self-help without further regard for the provisions of Section 6 of the Railway Labor Act, which require that the status quo be maintained while the case is docketed with the Mediation Board.

Finally, the carrier has purported to abrogate unilaterally the union shop agreements of 18 organizations. Part of this matter was involved in the BRT case, since the BRT had a union shop agreement. There were 17 other organizations which are parties to a union shop agreement with the carrier.

On July 31st, 1963, the carrier proposed to cancel the agreements by notice, which it served on the organizations. The parties met; they conferred on, I believe, August 29th, 1963. The conference broke down over the Court Reporter issue once more and the carrier, nevertheless, reported to abrogate the agreements on September 9, 1963, although the Mediation Board's services had been invoked with ten days after that conference broke down. The Mediation Board formally docketed the case on October 11.

The carrier advised the Mediation Board that it 33 did not consider the labor organizations to be in a position to invoke the Board's services, and again indicated that the Board was without jurisdiction.

I might state, Your Honor, that since this has happened, the Mediation Board has not undertaken mediation. Its jurisdiction was contested by the carrier. The carrier put the changes involved into effect and the Mediation Board

has not mediated on the August 24—I'm sorry, on the September 24 "Uniform Working Agreement", nor has it done so with respect to the union shop abrogation, with one exception; I believe the International Association of Railway Employees was a party to the original docketing of the September 24th notice which the IARE subsequently requested that it be eliminated from that docketing.

The carrier states in its answer that it has not but the "Uniform Working Agreement" into effect for the IARE. And the Mediation Board did send a Mediator down to mediate on that dispute in March of this year. It has been a dispute between the carrier and the Board since that time over how the mediation is being conducted. And that, however, I don't believe to be relevant to this suit.

34 Now, the actions by the carrier are violations of the Act's requirements in the following respects:

First, insofar as the "Uniform Working Agreement" of September 24, 1963, which is a permanent statement of the temporary conditions of September 1, 1963, is concerned the carrier has violated the Act by putting that into effect notwithstanding the fact that the services of the Mediation Board have been invoked. This violates Sections 2, Seventh, and 6 of the Act. And we also believe it violates the carrier's duties to bargain under Section 2, First and Second, of the Act; since, by avoiding the requirements of the Act, it makes a prima facie case of failing to bargain as the Act contemplates.

Similarly, the abrogation of the union shop agreement on September 9th, 1963, after a timely invocation of the services of the Mediation Board, constitutes a violation of Sections 2, Seventh, and 6, and Section 2, First and Second.

Now, when we drew this complaint, Your Honor, I was uncertain from the information available to me whether the "Conditions of Employment" of September 1, 1963, which are supposed to be temporary conditions the car-

rier has put into effect because of the strike emergency, were still in effect or not. It seems to be clear from the answer that the conditions of September 24, 1963, the "Uniform Working Agreement", are now the conditions under which this carrier is operating and it is not operating under the "Conditions of Employment".

It also appears to be clear that, as far as the operating organizations are concerned, the carrier is not operating under the "Conditions of Employment" of September 1, 1963, but is now operating under the collective bargaining agreements which were in force prior to the time the strike began, as amended by certain notices served on November 2nd, 1959, in the national railway dispute. So that the carrier is not operating under these temporary "Conditions of Employment" at all.

Our concern with the temporary "Conditions of Employment" therefore is not so much that it is currently operating them, but that if it were enjoined from continuing the "Uniform Working Agreement" of September 24, that it would revert to these "Conditions of Employment" which contain substantially the same thing, and then say that these are only temporary because of the strike.

Now, I think that Mr. Devaney and I could turn to the answer and the complaint and trace for the record the substantial history of this dispute.

I would also refer to the affidavit of Eugene C. Thompson, which is in the record.

The Court: Where is that in the record?

Mr. Shapiro: That is attached to the—

The Court: Attached to the Motion for Preliminary Injunction?

Mr. Shapiro: Attached to the Motion for Preliminary Injunction.

Now, Mr. Thompson's affidavit is intended simply to present to the Court the documents from the records of the Mediation Board which reflect the history of the notices

of these several disputes, of the docketings of these several disputes, of the carrier's objections to the docketings and of the carrier's implementation of the several notices that it proposed. I don't think there is any substantial
 37 dispute as to the contents of that affidavit.

There is one matter I would like to clear up which we weren't able to do when we drew the affidavit. That is the matter of a date.

As we go through the answer—as we go through the complaint and answer, I think, by referring to the documents in the affidavit, we can trace substantially the history of the dispute for the purposes of the record and tell a comprehensive story which will eliminate the necessity for most of the proof which we might otherwise have had to put on.

Perhaps Mr. Devaney and I can begin then and go along step by step.

The answer, turning to the complaint, it's admitted, of course, that the carrier is a corporation, that it is covered by the Railway Labor Act, that since January, 1963, the 11 labor organizations have been on strike.

I think it's admitted that, on September 24, 1963, F.E.C. served a notice, a Section 6 notice, on 17 labor organizations. Now, that Section 6 notice, Your Honor, appears in Mr. Thompson's affidavit as Exhibit 12. Actually,
 38 it's an attachment to Exhibit No. 12 of Mr. Thompson's affidavit. And there you will find the "Uniform Working Agreement" which the carrier proposes between the Florida East Coast Railway Company and the employees represented by the Brotherhood of Railway and Steamship Clerks.

There is a correction apparently indicated in the answer concerning the organizations to which this was sent. One of the organizations listed, United Transport Services employees, has two divisions, one for redcaps and one for train porters.

Now, it's admitted that on—

The Court: The answer says it was not served on System Federation No. 69, of the Railway Employees Department, AFL-CIO.

Mr. Shapiro: Yes, Your Honor.

The Court: That organization apparently is listed as one of the organizations served.

Mr. Shapiro: Yes, Your Honor. The reason for that is that the System Federation No. 69, of the Railway Employees Department, as I understand it, is actually made up of the five or six shop craft organizations, as they are called. These include the—my recollection may be a little foggy, but, glancing at the listing, it includes the International Association of Machinists; the Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Sheet Metal Workers International Association; the International Brotherhood of Electrical Workers; the Brotherhood of Railway Carmen; the International Brotherhood of Firemen and Oilers. So these are listed, these organizations are listed in that "Uniform Working Agreement" and they have a consolidated—or they had a consolidated collective bargaining agreement which was listed under System Federation No. 69, of the Railway Employees Department, AFL-CIO. And under that, the five or six component organizations.

Well now, after they served this notice on September 24, 1963, the answer admits that the carrier's representatives met with representatives of the labor organizations for the purpose of discussing the carrier's Section 6 notice of September 24. There is there a recital in the answer. It's admitted that the conference broke down over the matter of a Court Reporter.

The Court: Well, he doesn't seem to admit that. I'm looking at paragraph 6 of his answer. He says that:

"The representatives of all 17 labor organizations refused to bargain and no conference on defendant's proposed Section 6 notice ever commenced."

Mr. Shapiro: Well, at least—

The Court: Then he admits that they objected to the presence of the Court Reporter.

Mr. Shapiro: Well, let us say that the parties came face-to-face and they talked about talking and they broke away from each other. I think, for the purposes of our Motion for Preliminary Injunction, that much is clear.

Now, as the answer says, the International Association of Railway Employees later bargained on this issue.

Now, on October 23, 1963, this was five days
41 after the conference broke down, a letter was sent to the Mediation Board, which it received on October 28, 1963, as is accurately stated in the answer and I think is inaccurately stated in the complaint. The carrier was notified by the Mediation Board of the receipt of the application, and that notification appears attached to Mr. Thompson's affidavit as Exhibit 11.

When the Board received the application, it wired the Railroad. Actually, the Board was first notified that a telegram had been sent, invoking the Board's services. The Board immediately notified the carrier and the carrier wired back its position concerning the right of these organizations to invoke the Board's services. That position is stated in Exhibit 13 to Mr. Thompson's affidavit. What the carrier said was that:

"It is Railway's position that no provision of that Act prohibits presence of Court Reporter".

This is Exhibit 13:

"Consequently, organizations failed to fulfill their
obligation to negotiate on Railway's notice and are
42 not now in position to avail themselves of services of the Mediation Board, Railway enjoying right to place proposed rules into effect ten days from termination of conference by employees on October 18, 1963."

So there was a very plain statement of where the carrier stood.

Later, the Mediation Board received from the carrier a copy of a letter it was sending to the organizations. This appears as Exhibit 14 to the Thompson affidavit, which advises of the history of the negotiation, or the break-down of the negotiation, and then stated that:

“In view of the circumstances, pursuant to the provisions of Section 6 of the Railway Labor Act, as amended, this will constitute notice of the Railway placing in effect, as of this date, the proposed Agreement appended to its Notice to you of September 24, 1963.”

So, by letter of October 30, 1963, Florida East Coast put into effect the “Uniform Working Agreement” that it had proposed on September 24 and it did this notwithstanding the fact that the services of the
43 Mediation Board had been timely invoked.

Now, the Mediation Board docketed the dispute and sent the carrier a letter stating that it had docketed the dispute, which I believe is a telegram they sent to them dated October 31, 1963. That’s Exhibit 16 to the—

The Court: 15.

Mr. Shapiro: —15 to the affidavit.

And the Board concluded that telegram with these words:

“The attention of all concerned is called to provisions of Section 6 of the Act.”

I might say that the Mediation Board is not an enforcement agency and it’s only a mediation agency and they would not go much further than to docket the dispute, as their function requires, and call the attention of the parties to the law.

Whether anything can be done about this or not on behalf of the United States is a matter that the Department of Justice had to undertake to study. That is why we
44 are here, because the carrier did, in our judgment, violate Section 6.

Now, those are the operative facts, as far as the September 24, 1963 Notice is concerned, as we see the case.

We can proceed to the union shop dispute, which really is Count II of the complaint. This involves a similar history, again demonstrated in the affidavit.

This time, the union shop dispute began on July 31st, 1963. The affidavit of Mr. Thompson and I believe the answer both recite the relevant history of this adequately. On July 31st, they served a notice. On August 29, they met. They disputed over the Court Reporter.

Now, the complaint states that on September 6, 1963:

"The National Mediation Board received an application on behalf of 17 of the 18 labor organizations."

Mr. Thompson's affidavit, I don't believe accurately enough showed the date on which that application was received. We have available a certified copy of the original letter from the Order of Railway Telegraphers, 45 transmitting the application invoking the Mediation Board's services. This is not part of Mr. Thompson's affidavit. (Tendering instrument to Mr. Devaney and Mr. Milledge)

This letter bears the date stamp of September 6, 3:15 p.m., National Mediation Board. It also bears a signed statement that this is an official record of the United States Government and a document kept in the office of the National Mediation Board, certified a true copy.

We would like to offer this to the Court under Rule 44 as a Government record.

Mr. Devaney: Your Honor, I object, for this reason:

When Mr. Thompson gave his affidavit, this was—that is, the letter with a date stamp is not made a part of his affidavit. We took the deposition of Mr. Thompson. At that time, he had no knowledge. This was not—he did not have this with him. There has been no opportunity to question him about it, and because his affidavit was taken, I object to the introduction of it in this manner without an opportunity to further examine Mr. Thompson

concerning this. It's not a question of the matter
46 that is originally submitted by an official under the
idea that the shop book rule covers it. This was
not part of his original affidavit. His deposition was taken.
It was not made a part of it then, and I think, if it's to be
introduced at this time with the date stamp on it, we are
entitled to have the opportunity to further examine Mr.
Thompson.

Mr. Shapiro: In answer to that, I have Mr. Thompson's
deposition, Your Honor. I think it has been sent to the
Court. Mr. Thompson was—

The Court: The defendant Railway took Mr. Thompson's
deposition?

Mr. Shapiro: Yes, sir.

The Court: At some point in time between the filing
of the complaint in this case; is that correct?

Mr. Shapiro: Yes, Your Honor. Mr. Thompson's deposi-
tion was taken on Wednesday, May 20, 1964.

The Court: Yes, sir.

47 Mr. Shapiro: And Mr. Devaney had the oppor-
tunity to question Mr. Thompson about these date
stamps. He did question him, as I recall—

The Court: Was this letter identified by Mr. Thompson
at the deposition hearing?

Mr. Shapiro: No, Your Honor. The deposition subpoena
was not duces tecum and so he brought no documents with
him.

In the course of Mr. Devaney's questioning of Mr.
Thompson, I realized he was concerned that we didn't
have the original letter, transmitting the "Uniform Work-
ing Agreement" application for mediation in the affidavit,
and also that one of the letters we did have in the affidavit
did not bear the date stamp.

Mr. Thompson was questioned why that letter didn't
bear the date stamp and he said the reason was, when they
made the copies, somebody pulled the carbon instead of
the original letter. It was that simple an explanation.

When I realized this was a subject of concern
48 here, I asked Mr. Thompson to obtain for me a
certified copy of the document.

This is a letter written to the Mediation Board by the
Order of Railroad Telegraphers. It's a certified copy,
simply shows the date stamp and shows that the document
was received on September 6, 1963.

I don't believe the matter is of any great concern in any
event because—

The Court: Well—

Mr. Shapiro: —the conference broke down on August 29,
1963. As of September 9, 1963, the Railroad was formally
notified by a letter from the Mediation Board that its
services had been applied for. So that at least by Sep-
tember 9, which would have been the tenth day after the
conference broke down, the services of the Board were
invoked.

I offer this simply to clarify the record so that it will
show accurately that this particular letter was received
on September 6. I don't believe that Mr. Thompson could
49 give any other testimony but that the date stamp
is there on the letter; that that was the day it must
have been received in due course.

It was testified in the deposition proceeding that a letter,
or that correspondence received by the Board is in the
normal course date stamped in the manner that's shown
on the letter I'm about to offer, and indeed, in the manner
that's shown on most of the items that are attached to the
affidavit. Mr. Devaney had the opportunity to examine
on how these date stamps are put on the letters and how
the documents are processed in the files of the Board. He
was given an opportunity to question Mr. Thompson as to
why a couple of documents didn't have the date stamp.

The explanation was given as to why some didn't, be-
cause someone had pulled the carbon copy.

Mr. Devaney did not—let's see, I'm trying to recall
accurately the deposition which we received only this

morning but, as I recall it, Mr. Thompson was questioned as to why the date stamp did not appear. Let's see, he was questioned as to why the date stamp did not appear on the application of the Mediation Board—application to the Mediation Board that was attached to one of the documents in the file, and it was explained
 50 that the date stamp would appear not on the application but on the letter of transmittal. Now, all this is is a letter of transmittal which sent to the Board the application form of Mr. Leighty, invoking the services of the Board on the September 24 Notice. And the application for mediation is attached as Exhibit 5 to the complaint—to the affidavit of Mr. Thompson.

Now, here is the exact scope of the examination. This appears at page 7 of the deposition. Now, the application from Mr. Leighty is Exhibit 5. This is Mr. Devaney:

"I notice that your Exhibit No. 5, Mr. Thompson, which is attached, is an application for mediation from Mr. Leighty.

"Yes, sir.

"Now, I notice that it also does not bear a date stamp. Is there some reason why this document also does not bear a date stamp showing when it was received by the Mediation Board?

"Yes, there is.

"What is the reason on this particular one?

51 "The reason is that the letter transmitting the application bears the date stamp as being the first document in the papers. The date stamp was not applied to the attachments to the letter.

"And you haven't submitted a copy of that letter. So, therefore, you do not show the date stamp?

"Apparently. No, it is not in these exhibits."

Now, it seems to me that there has been an opportunity to examine it. The reason we brought this along was that he indicated he wanted to see it. It is a certified document, so we do tender it.

The Court: It's received in evidence as Plaintiff's Exhibit 1. It is received under the Government Record Statute, 1733 of Title 28, and under Rule 44.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit #1.)

Mr. Shapiro: Well, this established that on September 6, 1963, the services of the Board were invoked on this 52 "Uniform Working Agreement".

Now, we were turning to—I'm sorry, not the "Uniform Working Agreement", but on the union shop agreement. I erred in stating that.

The Court: I see.

Mr. Shapiro: Now, on September 13, 1963, in response to the Board's request to the carrier for its position, since the Board always notifies the carrier when it receives these applications and that request is refused, the carrier responded and it recited the history, as seen by the carrier, of the meetings that had been held. This is Exhibit 7 to Mr. Thompson's affidavit. I think the letter speaks for itself and I won't try to characterize it, but the thrust of it was, as it concludes in the last paragraph that:

"The organizations are not now in position under the Railway Labor Act to request the mediatory services of the National Mediation Board."

Now, this statement is plainly intended to mean that the Mediation Board did not have jurisdiction 53 over the dispute in the carrier's view.

Now thereafter, on September 9, 1963, and this was three days after the services of the Board had been invoked, ten days after the conference had broken down, F.E.C. announced it was putting its union shop proposal into effect and considered the union shop agreements for the 17 organizations involved abrogated. Again, this notification appears in Mr. Thompson's affidavit as part of Exhibit 7. The carrier stated that its notice of July 31st, 1963, had been put into effect as of September 9, 1963.

The Court: That's in the next-to-the-last paragraph?
Mr. Shapiro: Yes, Your Honor.

Now, the Board in the meantime was trying to decide whether to docket the dispute in the light of what the carrier had told it, and they did weigh the argument that had been advanced to it, as Mr. Thompson's affidavit recites, and their conclusion, which is reported by Mr. Thompson, is that they felt that they should docket the dispute. They sent a letter, which is Exhibit 8, to the carrier and to the organization's chairman stating that the application had been docketed. Exhibit 8 also recited, Your Honor, that:

"It is the Board's opinion that the carrier's position that the contracts—"

meaning the union shop contracts—

"are no longer in effect cannot be supported under the above record."

Reciting the various dates involved.

On October 15, 1963, the Florida East Coast wrote back to the Board stating its position that its actions were entirely in accordance with the Act, and taking issue with the Board's determination. Now, that's Exhibit 9 to the complaint.

The Court: Yes, sir.

Mr. Shapiro: To the affidavit, rather.

So that takes us through the August 24 notice and the September 24 notice.

Now, there remains this problem of the "Conditions of Employment" of September 1. As I say, we were uncertain whether they were operating under them or not. And turning to the answer, part of which is concerned with allegations relating to the history of the strike, we find, first, that defendant says with respect to "Conditions of Employment" that its operations under conditions imposed by the strike didn't in any way affect

or change any agreement with any labor organization; that the labor organizations were free at any time to return to work, in which event they would have returned under the terms of their agreement.

It does admit, however, that it had this document entitled "Conditions of Employment", which it proposed on September 1, 1963, and it characterizes this as a written embodiment of rules and practices which the defendant had been compelled by the strike to follow from February 3rd, 1963 in order to provide service to the public.

It admits that these practices were different from the practices in the agreements with the labor organizations. And it states that this is a consequence of the strike.

Then it goes on to state that, on September 24, he gave a Section 6 Notice of intent to place into effect an agreement entitled "Uniform Working Agreement", and refers back to the history of that.

55 Now, I take it that that means that at this moment this carrier is operating not under these "Conditions of Employment" but under the "Uniform Working Agreement".

Mr. Devaney, is that substantially—

Mr. Devaney: I'm sorry—

Mr. Shapiro: That at the present time the carrier is operating not under the temporary conditions of September 1, 1963, as far as the non-operating people are concerned, but under the "Uniform Working Agreement" of September 24, 1963? That's how I understand it.

Mr. Devaney: That's correct.

Mr. Shapiro: That's correct?

Mr. Devaney: Yes.

Mr. Shapiro: So there we have the "Conditions of Employment" out of the picture, so far as the non-operating people are concerned.

56 Now, the "Conditions of Employment" of course apply to both operating and non-operating people, since it's a consolidated document for both classes of employees.

The answer does not refer, as far as I know, to the operating employees but we are concerned with whether the "Conditions of Employment" are applying to the operating employees at the present time or not.

Now I understand, from argument in the Court of Appeals yesterday, that they are not and I would like to ask Mr. Devaney whether the carrier is now operating under the "Conditions of Employment" or whether it is operating under the permanent agreements for the operating organizations, that is, the Brotherhood of Locomotive Engineers, Brotherhood of Firemen or Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brakemen, and the Brotherhood of Railway Trainmen.

Are you operating with respect to those organizations under the "Conditions of Employment" or under the agreements for those organizations, as amended by the November 2nd, 1959, notice?

57 Mr. Devaney: We are working under the prior agreements, as amended by the '59 notice.

Mr. Shapiro: Well then, this establishes, I think, that for the purposes of our Motion for Preliminary Injunction—

The Court: I think this matter, if you will take a suggestion from me—of course, I don't question Mr. Devaney's right to state this matter as counsel, but I would think you ought to call Mr. Wyckoff and ask him this question.

Mr. Shapiro: We do plan to call Mr. Wyckoff and I can present it through Mr. Wyckoff.

The Court: Let's get it there, because this thing is—I heard these cases in December—I heard this trainmen case in March, and here it comes again. It's never quite the same, at least to my recollection, and I would like to get it nailed down for the proceedings.

Mr. Shapiro: Yes, Your Honor, we will develop that matter.

58 Now, does this refer to both the operating and the non-operating organizations? We'll develop it through—

The Court: Well, I think it's perhaps clear about the non-op's.

Mr. Shapiro: We'll develop it through testimony.

The Court: Anyway, you might cover both.

Mr. Shapiro: Well—

The Court: Get a statement from Mr. Wyckoff about it.

Mr. Shapiro: Now, I think that what we've established through the answer and the complaint is the basic history of the notices, the docketing, the conferences, the disputes over the Court Reporter, and the putting into effect of the agreements, of the proposals of September 24, 1963, the "Uniform Working Agreement", and the July 31st, the union shop abrogation.

59 We've also established that as to the non-operating organizations, the carrier is now operating under the "Uniform Working Agreement", not under its temporary "Conditions of Employment". It's yet to be established how the "Conditions of Employment" affect the operating organizations.

And I think that, and Mr. Thompson's affidavit runs through the basic history of the disputes and what it is the Government thinks happened, we now know that most of it did happen as it has been recited.

Now, with that much on the record and recognizing that Mr. Devaney will have factual matters to prove as well as argument today, I would like at this time to proceed to proof by calling Mr. Wyckoff to the stand.

Mr. Devaney: Your Honor, before we do that, as I mentioned earlier, we did have a Motion to Dismiss.

The Court: A little louder; I can't hear you. You have a low and gentle voice, and when you turn your head or back, it's hard for me to hear you and I think the Reporter has difficulty.

60 Mr. Devaney: I mentioned earlier that we intended to present a Motion to Dismiss and I believe that this would be an appropriate time to present the Motion to Dismiss. I did not have it earlier and I apologize for

the lateness, but with this is a Motion to Dismiss the Complaint of the intervenors and, as I mentioned earlier, it's our position that if the main action is dismissed the intervention must also fall, since it's dependent upon the main action. (Tendering instrument to the Court)

The Court: I agree with you.

Mr. Shapiro: May I say one word about—

The Court: If Mr. Shapiro goes out, Mr. Milledge is out, so far as that's concerned.

Mr. Shapiro: One word about hearing the Motion to Dismiss at this time, if I may, Your Honor.

The Court: Yes, sir.

61 Mr. Shapiro: I understand the answer is in.

The Court: It is.

Mr. Shapiro: And of course no Motion to Dismiss was noticed for this day in this proceeding.

Now, most of what's in the Motion to Dismiss, I would guess—I just received it, will relate to matters that would go to the defense against the Motion for Preliminary Injunction. I see that it's addressed, for example, as to whether the Court has jurisdiction; to the effect of the Norris-LaGuardia Act. It may go to the jurisdiction of the Adjustment Board.

Now, these are matters which have already been considered in the BRT case and they are matters which the carrier can raise in defense to our Motion for Preliminary Injunction on the ground that we have no substantial likelihood of success because of the various jurisdictional defects which it sees in our complaint.

The carrier's answer is in. As I understand it, motions raising lack of jurisdiction over the subject matter
62 must be made before pleading, if a further pleading is permitted, under Rule 12(b).

The Court: Yes, sir. But of course, if I don't have jurisdiction, I would notice it whenever it comes up.

Mr. Shapiro: Yes, Your Honor.

The Court: The only thing I want to do with this motion

is note that it's filed and I'll carry it with the case. I'll consider it with the other motions—with the other questions of law, at the conclusion of whatever evidentiary showing you want to make. I don't care to stop these proceedings at this point and hear further argument on it.

I gather that I'm requested to consider the Wyckoff affidavit and this exhibit, which shows the date stamp on the September 4 letter, the receipt stamp as September 6, I believe; is it?

The Clerk: Yes, sir.

Mr. Shapiro: Yes, Your Honor, as part of our direct.

63 The Court: As part of your case in chief, yes, sir. And you also intended to call Mr. Wyckoff. Is there anybody else you intend to call?

Mr. Shapiro: Well, we had planned to call Mr. Wyckoff and Mr. Thornton, who is also present in the Courtroom.

The Court: Yes, sir.

Mr. Shapiro: About, first, what is actually happening on the Florida East Coast and, secondly—

The Court: Then that, together with the affidavit—

Is Mr. Thompson—Mr. Thompson is not present, is he?

Mr. Shapiro: Mr. Thompson is not present, Your Honor. As I say, his deposition was taken in Washington.

The Court: I'll take his affidavit and exhibits and anybody can read in portions of his affidavit, either side can read in portions of his affidavit they want to read in.

64 Mr. Shapiro: The deposition, Your Honor?

The Court: The deposition, I mean.

Mr. Shapiro: We are both at a disadvantage on this, Your Honor. I think the deposition transcript became available only this morning. We only received it this morning. I don't know if Mr. Devaney has yet.

Mr. Devaney: No, I have not, Your Honor.

May I, on the record, I take it you meant, on the affidavit, you said Wyckoff, you referred to Mr. Thompson?

The Court: Excuse me. I meant Mr. Thompson; excuse me.

Mr. Devaney: Yes, sir.

The Court: The original, the Clerk's copy of the deposition, is here if either side wants to borrow it. You said you've got your copy, and you haven't got yours?

Mr. Devaney: I wasn't aware it had come in.

65 The Court: You can take the Clerk's copy and either one of you, later in the day, when you decide what part of that deposition you want, it can be put in then.

Mr. Devaney: There is one question with the deposition, Your Honor, and that is that, on most points about which we wished to examine Mr. Thompson, the Government entered the plea of privilege; so that I think, after we have had an opportunity to look at it, there will be some of those questions that we will have no choice but to file an appropriate motion to compel the answer, because it seems that the claim of privilege is both improper and without justification as to the particular matter involved. But we can—I don't have that and I don't know which questions would be in that character.

The Court: I'm sorry you didn't stop the hearing. This was done in Washington last week?

Mr. Devaney: Yes, it was.

66 The Court: I'm sorry you didn't stop the hearing and go to one of the District Judges in Washington and get an order at that time. It would be, it seems to me, better. But, at any rate, any matters about this deposition that either side wants to put in are certainly deferred until everybody has an opportunity to inspect it. And these questions of privilege lurking around, we'll meet those at that time.

Mr. Devaney: Very good.

The Court: I would like to take about a five-minute rest break before we start with your witnesses. You can be prepared to go ahead in about five minutes.

(Short recess)

The Court: You may proceed, Gentlemen.

Mr. Devaney: You Honor, before Mr. Shapiro begins, I would like to make one request and it is by way of request and as a suggestion.

We have filed various subpoenas duces tecum and I realize that some of the material, they probably would have some dispute as to whether they had it or
67 should produce it, but one of the items that we asked each of these individuals to bring was a Constitution and By-Laws. And what I would like to suggest now is that, if those could be submitted so that we could examine them during the noon recess, I believe it might help speed the process of this hearing rather than waiting and looking at those completely cold when they are submitted as each witness is called.

The Court: This seems reasonable to me. This request seems reasonable.

Mr. Milledge: If we may be heard on this, the Constitution and By-Laws of these organizations don't have the remotest relevance to anything before the Court. These organizations are on strike, that's to be sure, but we respectfully suggest that there must be some showing of materiality or relevancy before they are required to produce this. Perhaps some statement could be made as to what purpose they are desired, but certainly there is no indication of any relevancy at this point. The only issue—
excuse me.

68 Mr. Devaney: Your Honor, the relevancy and the reason that we have asked for these primarily is that there is a direct relationship to the union shop question which is one of the Counts of this complaint and one of the defenses to this is the discrimination practiced by the various unions against employees hired since January 23rd. This will be material, we believe, in showing that membership either is or is not available to these new employees, and if any order should be issued, we believe that this knowledge is essential to have on the record in

order that we know what the true facts are concerning the employees who will be directly affected by any decision of this sort.

Mr. Rutledge: Your Honor, may I be heard very briefly on that.

Section 2, Eleventh of the Railway Labor Act sets out what can be a union shop clause and it provides that if membership is not available or, in other words, if what Mr. Devaney proposes to show here is true, that then no person can be required to have his job terminated, if membership is refused for any reason other than tender-
69 ing the regular initiation fee and dues. So that we submit that under Section 2, Eleventh, whatever the Constitution of the organization might provide is irrelevant. If that is a fact, why then the Court in ordering the enforcement of the contract would be ordering simply the enforcement of the provision as required by Section 2, Eleventh of the Railway Labor Act.

Rather than burden this record with the Constitutions of the 11 various unions, which are very voluminous, bulky documents, we submit that it couldn't be possibly be relevant under the applicable law. There's nothing secret about these documents. May I say they are all on file with the Department of Labor, as required by law, so that we are not trying to hide anything by not producing them, but we are concerned with burdening the record with these documents.

The Court: They are not sought to be introduced at this time; simply sought to be produced for examination.

Are all the union heads here?

Mr. Rutledge: I believe they are all present in
70 in the Courtroom, Your Honor.

The Court: Can you collect these things up and turn them over to Mr. Devaney at this time, so that—

Mr. Rutledge: We can start assembling them, yes.

The Court: All right. I'm not prepared to say whether they will be relevant or material at some later point or not,

but he has subpoenaed them and I think he has made a sufficient showing of necessity to examine them.

Mr. Rutledge: May I ask all the various members to produce them?

The Court: Yes, sir. If it will help you, you can take the subpoenas, or I can call them off to you myself.

Mr. Rutledge: I have copies.

The Court: If you have copies of them, call them off and let them produce them. The list of documents attached to each subpoena is a mimeographed list, which I
71 assume is the same as to each of the union heads.

Mr. Rutledge: We have, Your Honor, a motion—

The Court: This is No.—

Mr. Rutledge: This is No. 1.

The Court: No. 1 on each list.

Mr. Rutledge: If we are to get these by the noon recess, I would like to ask the various union people to—it's a physical job of collecting this and bringing it in. And we have a motion which we were going to present to Your Honor concerning these subpoenas at the appropriate time.

The Court: Well, let's just say we've passed—we've decided your motion adversely to you as to this one item.

Mr. Rutledge: I understand.

The Court: All right.

72 Mr. Rutledge: May I ask the indulgence of the Court while—

The Court: Yes, indeed, that's what I had hoped you would do at this time.

Mr. Rutledge: Would you gentlemen, each of you who received the subpoenas, meet me outside in the corridor. (Mr. Rutledge and a group of witnesses withdraw from the Courtroom)

Mr. Shapiro: May we proceed Your Honor, or shall we wait for Mr. Rutledge?

The Court: Do you object to going ahead without Mr. Rutledge, Mr. Milledge?

Mr. Milledge: Let me just see how long it will take.

The Court: It shouldn't take very long.

Mr. Milledge: I would respectfully request to wait, if it's only a minute or two.

73 (Short informal recess, after which Mr. Rutledge returned to the Courtroom)

Mr. Rutledge: Your Honor, I have here most of them, I believe, except for the Supervisors'—that's back in the hotel room, I can supply that to you over the lunch hour. Here are substantially all of them, with the exception that on the Signalman there have been some revisions which the Local Chairman does not have here. We can supply that to you out of Chicago but it will have to be sent in by mail.

The Court: Well, you have an earlier copy of the Signalman's?

Mr. Rutledge: Yes, we do, Your Honor.

The Court: I wonder if that won't suffice for these proceedings?

Mr. Devaney: I don't know of any reason why not.

The Court: If for some reason it doesn't, why,
74 let Mr. Rutledge know and let him supply it later.

Mr. Devaney: That's fine.

The Court: But I imagine the provisions that you are concerned with have been embodied in each version of it as it has been amended or revised.

Mr. Devaney: I would assume so.

The Court: I would suppose that.

Mr. Devaney: I would assume that that would be entirely true.

The Court: But at least you can examine this. As I understand it, the only one that is not here is the Supervisors, which you will get to Mr. Devaney during the noon hour.

Mr. Rutledge: I believe that's so. I haven't had a chance to really go through these but any that are missing, we will certainly supply you as quickly as we can.

The Court: All right. You will deliver them to
 75 him. Thank you very much, Mr. Rutledge.
 (Mr. Rutledge tendering instruments to Mr. De-
 vaney)

The Court: All right. Now, may we proceed.

Mr. Rutledge: May I ask one other thing.

Mr. Ricard, who is the Division Chairman of the Tele-
 graphers, has been requested at the Seaboard. And we
 have here the General Chairman from that Brotherhood
 and also the Vice President of that Brotherhood. And
 I'm wondering if he can be released to protect his job
 with the Seaboard?

Mr. Devaney: Yes, Your Honor, we would—

The Court: If you have somebody else who can give—

Mr. Rutledge: We have the General Chairman and the
 Vice President, who know everything he does.

The Court: The gentlemen wants to leave, that's the
 point?

Mr. Rutledge: That's the point.

76 The Court: All right, if you will excuse him, then.

Mr. Rutledge: Thank you, Your Honor.

The Court: All right, sir, who do you want first?

Mr. Shapiro: Call Mr. R. W. Wyckoff.

Raymond W. Wyckoff.

having been produced and first duly sworn as a witness on
 behalf of the plaintiff, testified as follows:

Mr. Shapiro: Your Honor, we have called Mr. Wyckoff
 as an adverse witness under Rule 43(b).

The Court: Yes, sir.

Direct Examination

By Mr. Shapiro:

Q. Would you state your name, sir. A. Raymond W.
 Wyckoff.

The Court: Really, rather than an adverse witness, he
 is more properly a managing agent of an adverse party.

Mr. Shapiro: Yes, sir.

77 By Mr. Shapiro:

Q. Where are you employed, sir? A. Florida East Coast Railway, St. Augustine.

Q. I see. In what capacity? A. Vice President and Director of Personnel.

Q. What are your duties in that capacity, sir? A. They have to do with appliance of the various agreements, working agreements, with the employees performing service; handling claims, grievance, disputes that might arise under those agreements; serving Section 6 Notices of desired changes; processing Section C Notices served by the organizations.

Q. In what capacity, do you draft and prepare proposed agreements which are submitted to the organizations? A. On occasions, yes, sir.

Q. Did you participate in the drafting of a document entitled "Conditions of Employment", dated September 1, 1963? A. Well now, that is not an agreement. It wasn't served as a notice.

Q. I believe the question was, did you participate in the drafting of a document? A. Yes, I did.

Q. I hand you a document entitled "Conditions of Employment" applying to employees of Florida East
78 Coast Railway Company", and ask you if that is the conditions of employment of September 1, 1963?

A. It appears to be a reproduction of what was formulated, yes.

Mr. Shapiro: I ask that this document be marked for identification as Plaintiff's Exhibit No. 2.

The Court: Mark it.

(The referenced document was marked Plaintiff's Identification Exhibit No. 2.)

Mr. Shapiro: I ask that this be received in evidence as Plaintiff's Exhibit 2.

The Court: Is it objected to?

Mr. Devaney: No objection.

The Court: Mark it in evidence.

(Thereupon, Plaintiff's Identification Exhibit No. 2 was received and filed in evidence.)

By Mr. Shapiro:

Q. I show you a document consisting of a letter dated September 24, 1963, to which is attached a further
79 document entitled "The Uniform Working Agreement between Florida East Coast Railway Company and Employees Represented by" the labor organizations listed thereon.

Is this the notice of September 24, 1963, with attachments which were served upon the 17 labor organizations listed thereon? A. This is a portion of notice. The addressees are not attached thereto.

Q. The addressees are not attached.? A. That's correct. And of course, this is a reproduction of the original. It has been retyped.

Q. It has been retyped?

Does it appear to be substantially the document, or is it the document except for the retyping? A. Without reading it word-for-word, I can't tell if it's exact or not. It appears to be a reproduction of it.

Q. Mr. Wyckoff, have you read the complaint in this action? A. Yes, I have.

Q. Have you read the affidavit of Mr. William C. Thompson? A. Yes.

80 The Court: Isn't it Eugene Thompson?

Mr. Shapiro: Your Honor?

The Court: Isn't it Eugene instead of—

Mr. Shapiro: Eugene C. Thompson, yes, sir.

By Mr. Shapiro:

Q. Can you tell me whether the attachment to Exhibit 12 of the affidavit of Mr. Eugene C. Thompson, which I now show you, is the "Uniform Working Agreement" be-

tween the Florida East Coast Railway and the employees represented by the organizations listed thereon, which was proposed on September 24, 1963? A. Yes, it's a reproduction of it.

Q. Now, the document which I'm now going to show you is about identical with the exhibit to the affidavit of Eugene C. Thompson which we have just described; is that correct? A. Well, as I said—

Q. You may compare them. A. You asked me whether this was the notice that was served. I said this appears to be a reproduction, or a retyping of the notice, with the exception of the addressees.

81-82 Q. And the attachment entitled "Uniform Working Agreement"? A. It appears to be the same as that appended to Mr. Thompson's affidavit.

Mr. Shapiro: I ask that the "Uniform Working Agreement" between the Florida East Coast Railway and the employees represented by the organizations listed thereon, which has been identified by the witness as being the same as the attachment to Exhibit No. 12 to the affidavit of Eugene C. Thompson, be marked as Plaintiff's Exhibit No. 3.

The Court: I wonder if there's any need to duplicate in this record.

Mr. Shapiro: I don't think there would be, Your Honor. I believe the exhibits to this—

The Court: I am going to consider the affidavit and the attachments.

Mr. Shapiro: Fine; well, in that case, I won't—
83 The Court: This is a part of Exhibit 12 to the affidavit. I see no reason to put it in twice.

By Mr. Shapiro:

Q. Now, one final document, which is not in the record: I show you a document which purports to be a typewritten copy of a letter from the Florida East Coast Railroad to the Brotherhood of Locomotive Engineers, the Brotherhood

of Railroad Trainmen, the Order of Railroad Conductors and Brakemen, and the Brotherhood of Locomotive Firemen and Enginemen. Attached thereto is a document entitled "The Uniform Working Agreement between Florida East Coast Railway Company and Employees represented by" those organizations.

Mr. Devaney: Your Honor, I object to this. It seems to me that this is totally immaterial to anything we have in this proceeding.

Now, Mr. Shapiro asked earlier a question which I, as counsel, responded to but I think, to go into the questioning about the operating unions in this case which are not parties, not made—there's no portion of the complaint that
 84 alleges any action about these unions, I think this is totally immaterial and I object to going into correspondence or any other documents with organizations that are not in any way involved in this litigation.

Mr. Shapiro: Your Honor, I submit that these organizations may well be involved in this litigation in that, if the "Conditions of Employment" as applied to the operating organizations which remains in issue can be developed through testimony, then we have to demonstrate that these conditions do apply to these organizations.

If I'm able to establish through Mr. Wyckoff's testimony that they do not apply, that the "Conditions of Employment" do not apply, and we can develop exactly what does apply to these organizations, it may be that the issue will be dropped from the case; but at this point in our proof, it is not established that the "Conditions of Employment" apply to the organizations.

Your Honor asked earlier in the course of the opening statement that we develop just what is going on with respect to these operating organizations.

Now, there has been a series of changes of position by the carrier and I think we can clarify in the
 85 record by going through the various notices that have been served and withdrawn to establish what is going on.

Mr. Devaney: Your Honor, this merely points up again the fallacy of proceeding with this case, in our judgment. Now, Mr. Shapiro is now saying that the operating unions are involved in this case because of the uncertainty as to what rules may apply to them.

Now, one of the operating unions was the Brotherhood of Railroad Trainmen. One case has already been before Your Honor involving the Brotherhood of Railroad Trainmen. The complaint which is brought in this case is on behalf of 17 or 18 organizations, depending on how you count them, none of which, except the International Association of Railroad Employees, is an operating union.

Now, to go into matters which are beyond, completely beyond the complaint in this action as to what may or may not have happened or occurred to the other operating unions is simply beyond the scope of any information that's material to this complaint.

Now, they are not a part of it. No suit has been
86 brought on their behalf, and to go into it at this time is entirely beyond the scope of this complaint.

Mr. Shapiro: Your Honor, the complaint contains three Counts: Count I, dealing with the union shop abrogation; Count II, dealing with the September 24th notice to the non-operating organizations; and Count III, dealing with the "Conditions of Employment" of September 1, 1963.

Now, I believe I can show that those "Conditions of Employment" were applied to the operating organizations, and I would like to find out whether they are still being applied to the operating organizations or whether they have been abandoned. If they are being applied to the operating organizations under Count III, it is in the Government's view a violation of the Act. I think we are entitled to make our proof on that.

Mr. Devaney: Your Honor, these various organizations are listed in the complaint and I merely want to point out

to Mr. Shapiro that the complaint does not allege general violations as to unidentified labor organizations but very carefully specifies those in Exhibits A, B and C attached to the complaint, and these operating organizations are not organizations listed in either Exhibit A, B or C.

The Court: Well, without accepting Mr. Shapiro's version of the scope of the third Count, I'm going to permit him to inquire along this line and the objection is overruled.

I don't, by doing that, mean to imply that I accept without reservation your estimate of the scope of the third Count.

Mr. Shapiro: Yes, sir.

The Court: I will permit inquiry in it.

By Mr. Shapiro:

Q. Well, I show you a document entitled—which is a letter from the Florida East Coast Railway to the Brotherhood of Locomotive Engineers, the Railroad Trainmen, the Order of Conductors and Brakemen, and the Brotherhood of Locomotive Firemen and Enginemen, with an attachment thereto entitled “The Uniform Working Agreement between the Florida East Coast Railway Company and Employees represented by” those organizations.

Is this the proposed “Uniform Working Agreement” for operating organizations which was served on September 25, 1963? A. It's a reproduction of it, yes.

Mr. Shapiro: I ask that this be marked as Plaintiff's Exhibit No.—

The Clerk: 3.

Mr. Shapiro: I might say that this is the same document which is before the Court in *United States v. Florida East Coast Railway*, in No. 260, in 1963.

Mr. Devaney: Your Honor, I have no objection to the authenticity of the document. I merely object as to materiality.

The Court: Yes, sir, I understand; it's along the line of the previous objection.

Mark it in evidence.

(The reference document was received and filed in evidence as Plaintiff's Exhibit No. 3.)

89 By Mr. Shapiro:

Q. One final preliminary question, Mr. Wyckoff:

Have you received a subpoena directing you to bring certain documents with you? A. Yes, I have.

Q. Have you brought those documents with you? A. Yes, I have them with me.

Q. The subpoena calls for:

"Every kind of form, application, waiver, agreement or contract relating to employment on the Florida East Coast Railroad which the Florida East Coast Railway Company requested or required employees and applicants for employment to execute since September 1, 1963 to the present date."

Now, I think we might, if I might just examine those—do you have them? A. Yes. If I could leave the stand, I'll get them.

(The witness leaving the witness stand and proceeding to counsel table and obtaining envelope, which he tendered to Mr. Shapiro)

(The witness resumed the witness stand)

Q. There is a substantial sheaf of documents here.
90 I wonder if we could have them marked as the documents which the witness has brought with him.

The Court: Well, I don't think that any dispute is going to arise about that. Do you want the Clerk to—there are a number of documents in this manila envelope?

Mr. Shapiro: Yes, Your Honor, there are.

The Court: Do you want to leave the whole envelope there with the Clerk and pull them out as you go along?

Mr. Shapiro: I think that might be the—

The Court: I don't think there will be any dispute about that.

Mark it 4 for identification, and anything that comes out of it can—

Mr. Shapiro: Perhaps it might be simplest—I think I know what I'm after; perhaps I could ask Mr. Wyckoff to get it for me.

91 The Court: Let him pull it out of the packet and identify it.

By Mr. Shapiro:

Q. Will you take this, please (handing envelope to witness).

Mr. Wyckoff, you have signed the answer stating that you've read the facts therein and that they are true.

New, in the eleventh paragraph of the answer, which I shall show you, there is a statement that the defendant—I'm omitting a few lines—states that from—this is at page 8 of the answer at the top, states:

“That from September 1, 1963, until on or about October 30, 1963, it did require each employee to sign for a copy of the document entitled ‘Conditions of Employment’”, which signified his willingness to work thereunder; and that since on or about October 30, 1963, it has required employees hired after that date to sign for a copy of the “Uniform Working Agreement” which became effective on October 30, 1963, and his signature signified his willingness to work thereunder.

Do you have copies of the signature forms which are required of employees? A. Yes, sir. Here are the
92 Rules of Conduct form (tendering instrument); I'm sorry, “Conditions of Employment” form, and this is the “Uniform Working Agreement” form. (Tendering instrument)

Q. Is this the document which you've identified as the "Conditions of Employment" form? (Indicating) A. That's correct.

Q. Does that refer to the "Conditions of Employment" of September 1, 1963? A. That's correct.

Mr. Shapiro: I ask that this be marked as the plaintiff's next exhibit. (Tendering instrument to Mr. Devaney) I offer it in evidence as the plaintiff's next exhibit.

Mr. Devaney: No objection.

The Court: Let's call this 4A.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit No. 4A.)

The Court: I think that will indicate they are matters produced by Mr. Wyckoff under the subpoena.

93 The Clerk: Yes, sir.

By Mr. Shapiro:

Q. And this—is this the "Uniform Working Agreement" document? (Indicating) A. That's the receipt for the "Uniform Working Agreement".

Mr. Devaney: I'm sorry, Your Honor. What is being marked as Exhibit 4?

The Court: Well, anything that comes from these papers produced by Mr. Wyckoff will be 4 generally and 4A is the receipt for "Conditions of Employment" form.

Mr. Devaney: I understand.

The Court: And this one is receipt for the "Uniform Working Agreement"; is that right?

Mr. Shapiro: That's right, Your Honor.

The Court: That would be 4B.

94 Mr. Shapiro: 4B; we offer this in evidence as the plaintiff's Exhibit 4B.

The Court: 4B received.

(Thereupon, the referenced material was received and filed in evidence as Plaintiff's Exhibit 4B.)

By Mr. Shapiro:

Q. And now the remaining—do you have in that envelope the collective bargaining agreements currently in force—

A. Yes.

Q. —with the non-operating organizations and the International Association of Railway Employees? A. Each of the organizations listed in the complaint.

Q. To the best of your knowledge, are these up to date?

A. Yes. I have the various modifications with the agreements.

Q. Are there any remaining forms in this envelope which employees are required to sign? A. Yes, there is a Bulletin No. 1 for which employees are required to sign. It's a receipt form.

Q. What is that document? A. It's the large document standing on end. (Indicating)

95 Q. And what other documents, sir? A. There are receipt form documents for various materials; such as operating rule books, safety rule books, and so forth. Any receipt for a switch key, in the case of an individual who should receive a switch key, documents of that nature.

Q. Can we state, in order to save time, that the contents of this envelope, the remaining contents, consist of collective bargaining agreements for the non-operating organizations and, I believe, the International Association of Railway Employees— A. That's correct.

Q. —and remaining personnel forms which the employees are required to sign? A. That's right.

Mr. Shapiro: I wonder if I could just offer this?

The Court: This can be 4 generally. If there is any need later to extract individual documents and refer to them, I think they might be given a 4 and another letter.

96 Mr. Shapiro: Fine.

The Court: All right, just mark the envelope then as 4.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit 4)

Mr. Milledge: Your Honor, might we just note at this time on behalf of the organizations that we would like the opportunity to have our people look these over at some convenient time when the Court is not actually in session, so that in the event—

The Court: You and the Clerk can work that out.

Mr. Milledge: All right. But we do want to reserve any objection we might have. There may be some amendments that are not present.

The Court: I understand. It's put here because—they are given a designation because they are what Mr. Wyckoff has produced in response to the subpoena.

Mr. Milledge: Right.

97 The Court: And we want to give them—

Mr. Milledge: Which he asserts to be the contracts.

The Court: Yes, sir.

Mr. Shapiro: Well, I think we can return to the questions we would like to ask at this time.

By Mr. Shapiro:

Q. Mr. Wyckoff, at the present time, are the "Conditions of Employment" of September 1, 1963, which have been received as Plaintiff's Exhibit No. 2, which I now show you, in force and operation on the Florida East Coast Railway Company? A. No, they are not.

Q. Is this true for all—does this mean that no class or craft of employees of the carrier is working under these "Conditions of Employment" at the present time? A. That's correct.

Q. Now—

The Court: But they are working under the, what's called the working agreement of September 24 and September 25?

98 The Witness: Some crafts are, Your Honor. The operating crafts are working under the original working agreements, as modified by the 1959 rules notices.

The Court: Yes, sir.

By Mr. Shapiro:

Q. Now, it's in connection with that that I'd like to ask you a few questions, Mr. Wyckoff.

Prior to September 25, 1963, what agreements were your operating crafts or classes actually working under?

Mr. Devaney: Your Honor, I object to this on the basis of materiality. I don't see that what was or was not done in the operating crafts, who are not named in the complaint, is properly before this Court, and I think it's immaterial.

The complaint is brought on behalf of these—

The Court: This is the same question as I understand—the same argument we went through awhile ago.

Mr. Devaney: In part, Your Honor, but he has just established that they are not now in effect, so I see no
99 purpose in further burdening the record to go back to develop what occurred before September 25 with respect to the operating crafts.

The Court: The objection is overruled.

Mr. Shapiro: May I have the question, please.

The Reporter: "Prior to September 25, 1963, what agreements were your operating crafts or classes actually working under?"

The Witness: Mr. Shapiro, the only way that an agreement can be changed is by Section 6 notice. The Section 6 notices were served on September the 24th and 25th.

Now, until those agreements were negotiated and notices had been served, the original agreements remained in effect.

I'm not saying that we could have complied or did comply with those agreements that were in effect, because of the shortage of manpower. The unions went on strike or respected the picket lines of striking employees. They had a right to assert economic pressures against the carrier. By the same token, the carrier
100 had a right to operate. In order to operate, they had to do so in the manner most feasible with the

manpower available, so, for that reason, there were some deviations from the agreements that were in effect at the time; but the agreements, as such, were not changed.

By Mr. Shapiro:

Q. Now, speaking not of agreements, Mr. Wyckoff, but of rates of pay, rules and working conditions, what rates of pay, rules and working conditions were you operating under prior to September 24, 1963, as far as the operating crafts or classes were concerned? A. Well, as I said, there were deviations from the agreements. Various classes of work had to be consolidated because of the shortage of manpower and rates of pay differed from this set forth in the agreements, but it was only during the interim period of the strike.

Q. Mr. Wyckoff, you haven't answered my question. The question is: What rates of pay, rules and working conditions were you operating under as far as the operating crafts or classes were concerned? A. As far as the classes and crafts were concerned, we operated under the rates of pay that were in effect in the old agreements, but we
101 had to deviate from the conditions set forth in those agreements; so, therefore, the rates of pay deviated also.

Q. Mr. Wyckoff, I show you Plaintiff's Exhibit No. 2, a document entitled "Conditions of Employment Applying to Employees of Florida East Coast Railway Company".

Can you tell me whether that document applies to employees in the operating crafts or classes—applied to the operating crafts or classes of the Florida East Coast Railway Company? A. It did apply, yes, for a period of time.

Q. So this was the rates of pay, rules and working conditions which you were operating under prior to September 24, 1963, and after September 1, 1963? A. We were operating in the manner set forth in this but this did not change the rates of pay, rules or working conditions in the duly negotiated agreements.

Q. Now, Mr. Wyckoff, I show you a copy of Plaintiff's Exhibit 4A and ask that you read the text of the Agreement. (Tendering instrument to the witness) A. It's addressed to the individual and, after he fills out the preliminaries as to his job classification, rate of pay, home address, and so forth, it reads as follows:

102 "I have this date been furnished with a copy of the 'Conditions of Employment' in effect on the Florida East Coast Railway Company. These 'Conditions of Employment' are completely satisfactory to me, my signature hereon signifying my acceptance thereof and willingness to work thereunder."

Q. Now, Mr. Wyckoff, in your verified answer to the complaint in this action, you stated, at the top of page 8, that:

"Until on or about October 30, 1963"—

I'm paraphrasing the language—

"the Florida East Coast did require each employee to sign for a copy of the document entitled 'Conditions of Employment', which signified his willingness to work thereunder."

Now, was any employee working under any conditions except the "Conditions of Employment" which they were required to sign for? A. You mean prior to October 30?

Q. Yes. A. No.

103 Q. Then— A. Other than supervisory personnel, of course.

Q. All right. Then the "Conditions of Employment" were the exclusive rates of pay, rules and working conditions for anybody actively in employment by the carrier; were they not? A. They were the rates of pay that were being applied at the time during this interim period, yes.

Q. The question was rates of pay, rules and working conditions, Mr. Wyckoff. Were they also the rules and working conditions? A. Yes. As I said a minute ago, we weren't able to comply with the agreements that had been negotiated because of the shortage of manpower.

Q. And these conditions were the exclusive agreements—I'm sorry—these conditions were the exclusive rates of pay, rules and working conditions for the people showing up for work? A. That's right. They were a formulation of rates of pay, rules and working conditions that applied during that interim period of time.

Q. So that you were not working under the agreements, were you, Mr. Wyckoff? A. We were working under the agreements but we were forced to deviate from the agreements.

104 Q. And you just said that this was the exclusive agreement under which people who were actually employed were working? A. I didn't say that was the exclusive agreement. I said those conditions applied during that interim period that we were forced to deviate from the agreements.

Q. I understand that your claim is that you were forced to deviate from the agreements.

Now, you've also testified that nobody was working under any other conditions of employment. I'm not asking you why you had the "Conditions of Employment". I'm just asking you what conditions of employment were in operation.

Now, it was these and only these, was it not? A. That's correct, yes.

Q. All right.

Now, did these conditions—you've already testified, I believe, that the "Conditions of Employment" applied to the operating personnel.

Mr. Wyckoff, do you recall having testified in action entitled "United States of America vs. Florida East Coast Railroad, No. 63-260-Civil-J, on— A. Yes, I do.

Q. —on December 11, 1963? A. Yes, sir.

105 Q. Do you recall that I was the attorney conducting the examination? A. That's correct.

Q. Now—

Mr. Devaney: Your Honor, I object to going into this. It seems to me totally immaterial. I don't see what Mr. Shapiro is attempting to prove here.

The Court: I take it that this is an impeachment by his testimony in the prior proceeding?

Mr. Shapiro: I'm trying ultimately, Your Honor, to establish what is going on on the carrier, and I do want to be sure that we have exhausted the witness' knowledge in light of some of his prior statements.

The Court: You may proceed. Do you have a transcript of that?

Mr. Devaney: No, I do not, Your Honor.

The Court: Well, I'll be glad to have you look over Mr. Shapiro's shoulder as he goes ahead.

106 Mr. Devaney: Well, if there—

The Court: You might make some kind of a mark there.

Mr. Shapiro: Yes, I have.

The Court: We don't have our transcript here? We don't have that other file here, do we?

The Clerk: No.

By Mr. Shapiro:

Q. Now, Mr. Wyckoff—

The Court: Excuse me. Could somebody go get it, get it from the Clerk's office, 63-260, and get the transcript, Mr. Hamilton, and then the portions of it that Mr. Wyckoff is questioned about can be marked with a red pencil or something, so that you will know what to go back to. It won't take but a second.

Mr. Devaney: Your Honor, I have no objection to proceeding if Mr. Shapiro will jot down the page numbers. I

can jot it down and we will look at it as soon as they
107 bring your copy.

The Court: All right. What page are you on?

Mr. Shapiro: I think this is page 148 and 149 of the transcript.

The Court: All right, sir. You might give him the lines. Aren't the lines numbered?

Mr. Shapiro: Yes, they are.

The Court: Where do you begin?

Mr. Shapiro: I think it begins at line 17.

The Court: Page 148.

Mr. Shapiro: On page 148, and goes through—

The Court: Well, you can tell him when you stop. You can give him another designation. You might proceed, then.

By Mr. Shapiro:

108 Q. Mr. Wyckoff, how long did the carrier continue to operate under the rates of pay, rules and working conditions set forth in the "Conditions of Employment" of September 1, 1963, as applied to operating crafts and classes? A. Actually, we worked under at least some of those conditions until February the 25th of this year.

Q. I see.

Mr. Wyckoff, in the previous action, which I have already mentioned to you, I asked you:

"Now, with respect to the non-supervisory personnel who are presently operating your trains, what agreement or what arrangement with respect to rates of pay, rules and working conditions are in effect for them now?"

And your answer:

The Court: That's on page 148, line?

Mr. Shapiro: 148, line—

The Court: 17?

109 Mr. Shapiro: No, I guess I'm starting a little lower. It's line 25, the very last line.

The Court: All right.

By Mr. Shapiro:

Q. Your answer, sir was:

"The rule that became effective November 4, 1963."

Do you recall what rule that was? A. No, I'm sorry, I don't.

Q. To refresh your recollection, I show you Plaintiff's Exhibit No. 3. (Tendering document to witness) A. Yes, sir.

Q. Is that the rule which became effective November 4, 1963? A. That did with respect to other than the trainmen. The trainmen continued to negotiate.

Q. Now, that is the "Uniform Working Agreement" for the operating crafts or classes, is it not? A. That's correct.

Q. I then asked you:

"And prior to November 4, 1963, what was in effect?" Your answer was:

"We worked under the old rules that were in effect."

Now, are the "Conditions of Employment" of September 1, 1963, the old rules that were in effect? A. No. They were never rules in effect. The old rules in effect that I had reference to with respect to the trainmen were the '49 rules.

With respect to the other crafts, the dates differed but those were the rules that were in effect.

As I said, we were forced to deviate to some extent from those rules and that deviation was formulated in the "Conditions of Employment".

Q. What were you actually working under, Mr. Wyckoff? A. We were actually working under the rules that were negotiated. We were deviating from those rules because of the shortage of manpower. We were forced to deviate.

Q. What do you mean by "working", Mr. Wyckoff? A. We were applying the rules to the extent possible with the manpower we have available.

Q. You just—you testified a few moments ago that the “Conditions of Employment” were the exclusive rates of pay, rules and working conditions applied to the operating crafts or classes; did you not? A. That’s correct.

Q. And how could you be working under the old
111 rules in effect when you were working under the
“Conditions of Employment”? A. Because you
can’t change the rules that are in effect unless you go
through the process of the Railway Labor Act.

The Court: You are telling us about the law. He is asking you what you did.

The Witness: Your Honor, we applied those rules to the extent possible with the manpower we had available. As I said, we were forced to deviate from those rules because of the shortage of manpower and that deviation was formulated in this “Conditions of Employment”.

The Court: For instance, Mr. Wyckoff, the shortage of manpower caused you to deviate by offering higher wages than specified in the 1949 agreement, as amended, or the earlier working agreements with these various crafts?

The Witness: That was one of the results, yes, sir; we were forced to consolidate positions. Where a man before
112 did one specified type of work, under the conditions
that were in effect as a result of the strike, he did
several types of work.

Mr. Shapiro: Well, Mr.—

The Court: You may proceed.

By Mr. Shapiro:

Q. Mr. Wyckoff, how can you state that you are working under the old rules when you are in fact working exclusively under the “Conditions of Employment”?

Mr. Devaney: Your Honor, I think this is becoming argumentative. Mr. Wyckoff has stated his position and—

The Court: I would like it clarified. It has been a mystery to me all through this proceeding, some of these answers. I would like it clarified as best Mr. Wyckoff can clarify it and as best I can understand it.

Mr. Shapiro: Has the witness answered the question?

The Reporter: No.

113 Mr. Shapiro: Would you read the question, please.

The Reporter: "Mr. Wyckoff, how can you state that you are working under the old rules when you are in fact working exclusively under the 'Conditions of Employment'?"

The Witness: As I said a minute ago, the rules that are in effect are those that are negotiated. We can't change those rules unilaterally. We can deviate from the rules where we have to in order to operate the property.

By Mr. Shapiro:

Q. Were the "Conditions of Employment" in effect? A. The "Conditions of Employment" did not go into effect as such. They were simply a formulation of practices that arose during the period of the strike.

Q. You say that they didn't go into effect as such. You required each employee to sign for those "Conditions of Employment" and you state that they worked under them? A. That's correct.

Q. Were they in effect as to employees who signed for them? A. The employee was being paid in accordance with them, yes.

Q. And did he work in accordance with them? A. Yes, he did.

Q. Was his seniority measured in accordance with them? A. Yes.

Q. And were his assignments measured in accordance with them? A. Yes.

Q. Was his job classification measured in accordance with them? A. Yes, because they were deviations from the rules.

Q. Were the disciplinary procedures measured in accordance with them? A. Yes.

Q. Were the hours of pay, hours of work, measured in

accordance with them? A. Yes, all the conditions set forth were those that applied during this interim period.

Q. And nobody was working under any other agreements, I take it, when they were actually employed, everything they did was governed by these "Conditions of Employment", were they not? A. They were working under the other agreements because the other agreements were negotiated agreements. These were simply conditions that applied to them while they performed service.

In other words, if the strike was to have ended during any period of time, we would have reverted back to the agreement that was in effect at the time. The "Conditions of Employment" would have gone out the window.

Q. But the agreement was not in effect while the "Conditions of Employment" was in effect? A. Certainly it was. We didn't have the right to unilaterally cancel any working agreement.

Q. I certainly agree with that, Mr. Wyckoff but the fact of the matter is that you were not operating under them, were you? A. No, we could not.

Q. Whatever the explanation is, the fact is you were not operating under them, were you? A. As a result of the unions' actions, we were not.

Q. Thank you, Mr. Wyckoff.

Now, on November 4, 1963, you testified that you put into effect the conditions of September 25, 1963, I think as I recall your testimony; that they continued in effect until February 24, 1964. Is that right, sir? A. No, as a result of the decision of this Court—Are you speaking of the operating crafts?

116 Q. Yes. A. As a result of the decision of this Court, some of the provisions were rescinded.

Q. And now, when you rescinded those provisions, sir, did this have any effect on the rate of pay of any employee operating the trains during that period, the amount that he actually took home with him? A. I would say no, be-

cause the "Conditions of Employment" are somewhat similar to the other rules, the "Uniform Working Agreement". And they worked, continued to work under the "Conditions of Employment" in most cases. So, for that reason, there was no change in the actual takehome pay as you've termed it.

Q. Were there any other changes in the actual working situation of an employee operating your trains? A. Yes. We attempted to comply with the Order of the Court. We advertised positions in accordance with the old agreement, old agreements. We received no bids from the men on strike or respecting the picket lines of striking employees. There was nothing else we could do.

Q. What did you do to comply with respect to the employees who were actually working? Did you pay them under your "Conditions of Employment" or under the previous collective bargaining agreement? A. We
117 paid them under the "Conditions of Employment" because we were forced to deviate from the collective bargaining agreement as a result of the shortage of manpower.

Q. Mr. Wyckoff, why didn't you mention the "Conditions of Employment" when you were being questioned by me on December 11, 1963?

Mr. Devaney: Now, Your Honor, I object to this. If counsel is going into this, I'm going to insist that we put him on the stand, because there was no doubt that Mr. Shapiro had discussed with me and was fully apprised of the "Conditions of Employment".

Now, the fact that he didn't ask about the "Conditions of Employment" was a matter that he chose not to go into with the witness. So I think, as to why he did not ask a question, it's improper. If he wants to examine him on the theory of credibility as to what Mr. Wyckoff actually testified to, that's his prerogative, but to go into matters as to why he did not mention something he was not asked about, I think is totally improper.

The Court: The objection is overruled. It is not a question of whether he was asked about. He was
 118 asked about what agreements were in effect, what rates of pay, rules and working conditions were in effect.

The objection is overruled.

You may proceed.

By Mr. Shapiro:

Q. Now, Mr. Wyckoff, the question you were asked was what agreement or what arrangement with respect to rates of pay, rules and working conditions are in effect for them now. And you've testified today, for everybody who was actually working and signed for these "Conditions of Employment", as to them, the "Conditions of Employment" were in effect.

But you testified in answer to the question:

"What agreement or what arrangement with respect to rates of pay, rules and working conditions are in effect for them now?"

that

"The rule that became effective November 4, 1963."

You didn't mention the "Conditions of Employment".

And then you were asked:

"And prior to November 4, 1963, what was in effect?"

119 And you answered:

"We worked under the old rules that were in effect."

And you testified that the old rules are not the "Conditions of Employment".

I repeat: Why didn't you mention the conditions of September 1, 1963? A. Because you asked me what agreement was in effect, the agreement or conditions was in effect.

Q. I asked you what— A. And as I just told you today, the "Conditions of Employment" did not go in effect as

such. They were simply a formulation of practices that arose during the period of the strike.

Q. You were asked what conditions or arrangements were in effect. A. That's right.

Q. Is the "Conditions of Employment" of September 1, 1963, an arrangement necessitated by the strike? A. It never went into effect. I told you that today.

Q. Mr. Wyckoff, you just testified that it was in effect for the employees who signed for it.

Mr. Devaney: Let me object again. If Mr. Shapiro is going to examine and try to impeach the witness, I would please direct him to his own question when he asked about, he said:

"Q. Now, with respect to the non-supervisory personnel who are presently"—

And remember, this is in December—

"who are presently operating your trains, what agreement or arrangement with respect to rates of pay, rules and working conditions are in effect for them now?"

And Mr. Wyckoff answered:

"The rule that became effective November 4, 1963."

Now, Mr. Shapiro asked about rules, arrangement, and so forth.

The Court: He asked him what was in effect.

Mr. Devaney: That is correct; that is correct.

When he came down to his next question, he said not all this gobbledygook about rules, arrangement, and so forth; he asked him one specific question and that was this:

"The rule that became effective November 4, 1963?"

Then the question was:

"And prior to November 4, 1963, what was in effect?"

And Mr. Wyckoff said:

"We worked under the old rules that were in effect."

Now, I don't see what Mr. Shapiro is getting at in trying to imply that less than a full answer was given to the questions he asked. Now, the fact that he did not specify

and ask about something that he now wants to inquire about, I repeat, is improper.

The Court: Objection overruled.

Mr. Devaney: He did not ask that question.

The Court: Excuse me, are you finished?

Mr. Devaney: Yes, I have.

The Court: Objection overruled.

You may proceed.

122 By Mr. Shapiro:

Q. Now, Mr. Wyckoff, I asked you subsequently the following question. This is at line 7 on page 149:

"And am I correct, Mr. Wyckoff, that if the rules which were put into effect on November 4, 1963, were to be withdrawn, that the previously existing arrangements would be placed in effect, would govern the employment, would govern the rates of pay, rules and working conditions of the employees in the crafts or classes who are presently operating your trains?"

And you stated:

"We would revert to the last duly negotiated rules, which were those in effect prior to November the 4th."

Now, were employees who were presently—I mean, in December—operating your trains working under rates of pay, rules and working conditions contained in the last duly negotiated rules? A. They were working under those rules, yes. There were deviations from the rules because of the conditions created by the employees represented by the unions not working.

123 Q. You have stated that the "Conditions of Employment" were not duly negotiated rules; is that right? A. That's correct.

Q. You've also stated that the employees were working actually on the job under the "Conditions of Employment"; so that, if you reverted to the last duly negotiated

rules, you would not have reverted to the "Conditions of Employment"; is that right? A. We would have reverted back to the rules that were duly negotiated; in the case of the trainmen, it was the 1949 rules. Now, whether we could have complied with all provisions of those rules was an entirely separate question. We could not comply unless the employees represented by the unions returned to work.

Q. You weren't asked that question. You haven't been asked that question.

Now, Mr. Wyckoff— A. I'm trying to give you a full answer, Mr. Shapiro.

Q. The question really goes down to whether your duly negotiated rules were in effect or not for the people operating your trains. And you testified you weren't paying under them, you weren't working them under them, your seniority wasn't under them; so that the duly negotiated rules were not in operating effect, were they?

124 A. The duly negotiated rules remained in effect. As I told you before, we do not have the right to unilaterally change the rules or take it out of effect.

The Court: Mr. Wyckoff, they remained in effect in the sense that there had been no abrogation of them by any notice to or from you or the railway or the unions. They were in effect in that sense that they were still documents, but they weren't being—no operation was being carried on under them. I think that's the way I understand it.

The Witness: That's what I said, Your Honor. We couldn't comply wholly with those rules because of the shortage of manpower. They were in effect.

You couldn't comply with them when an employee came on the job, you made him sign for and agree to be bound by these "Conditions of Employment". You couldn't, as long as you were doing that, you couldn't comply with the prior existing agreements.

The Witness: That's what I say. We could not comply with them—

125 The Court: That's for sure.

The Witness: —because we did not have the manpower. And these conditions simply told the man coming to work what conditions he would have to work under during the period of the strike.

The Court: You didn't limit it; there's no limit in that receipt he signed.

The Witness: It isn't spelled out in the receipt, but each man was told that.

The Court: Is it spelled out in the "Conditions of Employment" that this is an emergency strike measure and applies only during the strike?

The Witness: Every man was told that these conditions applied only—

The Court: Every man was given a written "Conditions of Employment" agreement. Every man was required to sign a receipt for it.

Now, in either of those documents, is there any
126 indication that this is an emergency strike measure?

The Witness: No, it is not spelled out as such in the document.

The Court: All right, sir.

By Mr. Shapiro:

Q. One final question on this aspect:

After the judgment of this Court in the case that was tried on December 11, 1963, and you gave the testimony which we have been discussing, did you revert to the last duly negotiated rules which were in effect prior to November 4, 1963? A. Yes, we did, to the extent possible with the manpower available.

Q. Did you operate under them? A. We attempted to. We bulletined the jobs under them. We received no bids from the employees who were not working.

Q. Did you require employees who came to work to sign the document making the "Conditions of Employment" the exclusive conditions under which they would work? A. We made them sign a document acknowledging

receipt of those conditions and a willingness to work there-
under and, as I say, that was because of the con-
127 ditions imposed by the strike.

Q. And that was the extent of your reversion to the rules of November 4, prior—I beg your pardon. That was the extent of your reversion to the rules in effect prior to November 4, 1963? A. Mr. Shapiro, we couldn't operate under those rules if we didn't have the manpower to do it.

The Court: Well, the answer is yes?

I think we've had this same statement and answer to enough questions for me to know your position in this respect.

The answer to the question is yes, as I understand it; is that right?

The Witness: Well, as I say, we attempted to revert to the old rules, Your Honor.

The Court: Don't make that statement again. I've got your position in that respect.

By Mr. Shapiro:

Q. And now, the "Conditions of Employment", as I recall your testimony, the "Conditions of Employment" were what your people on the job were working
128 under? A. They were working in compliance with that.

Q. Until February 24, 1964; is that right? A. (No response)

Q. Is that right, sir? A. February 24—you're speaking of the non-operating crafts?

Q. No, the operating crafts. A. Operating crafts, I believe, February 25.

Q. February 25.

Now, on February 25, you put a new set of rates of pay, rules and working conditions into effect; did you? A. We didn't put a new set of rates of pay, rules and working conditions in effect. We modified the agreements then in effect by the 1959 rules.

Q. Well, your answer is, I take it, that you were operating after February 25, 1964, you were actually operating under the November— I'm sorry— after February 25, 1964, you were operating under the basic collective bargaining agreements for your operating crafts or classes as amended by the November 2nd, 1959, notice; is that correct? A. That's correct.

Q. Now, did you give notice to the—to any of the operating organizations of your intent to put these rates of pay, rules and working conditions in effect? A. We gave 129 notice to each of the operating organizations.

Q. I show you a letter dated February 24, 1964, from the Florida East Coast Railway Company to the Order of Railway Conductors and Brakemen, Brotherhood of Locomotive Engineers and Brotherhood of Firemen and Enginemen.

Is this the notice which you gave to those organizations? (Indicating) A. This is the notice that we gave to three of the organizations, yes. There was a separate letter written to Mr. Van Arsdall.

Q. We will take that in a moment, sir.

Mr. Shapiro: I ask that this be marked as Plaintiff's next exhibit.

The Clerk: Are you offering it?

Mr. Shapiro: I shall offer it.

The Court: 5?

The Clerk: 5.

130 Mr. Shapiro: Do you have any objection, Mr. Devaney?

Mr. Devaney: No, I have no objection.

The Clerk: Received as 5.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit No. 5.)

Mr. Devaney: Except as noted before on materiality.

The Court: Yes, sir. I think that your objection to this line of testimony will be addressed to this document also.

Mr. Devaney: Yes, sir, that's correct, Your Honor.

The Court: And it was in that light.

By Mr. Shapiro:

Q. And I show you a letter dated February 24, 1964, to Mr. H. O. Van Arsdall, Brotherhood of Railroad Trainmen?

Is this your notice to the Brotherhood of Railroad Trainmen? A. Yes, it is.

131 Mr. Shapiro: I ask that this be marked and received in evidence. (Tendering to Mr. Devaney)

The Court: Mark this one 6. Is it similar to 5?

Mr. Shapiro: The wording is quite different, Your Honor, for reasons which I'll develop.

The Court: That's all right. You might hand them both up.

(Thereupon, the referenced document was received and filed in evidence as Government's Exhibit No. 6.)

The Court: Do you want to inquire about it?

Mr. Shapiro: I would like to ask a few questions.

Your Honor may wish to examine the letter.

The Court: Go right ahead. I'll examine it later.

By Mr. Shapiro:

Q. Now, you have testified, Mr. Wyckoff, that the carrier ceased to operate under the "Conditions of Employment" and, after February 25, 1964, operated under the rates of pay, rules and working conditions in the basic agreements, as amended by the November 2nd, 1959 notice; is

132 that correct? A. That's correct.

Q. Were any other agreements, rates of pay, rules and working conditions, in effect at that time? A. Of course there were rates of pay, rules and working conditions in effect. The old agreements were in effect and they remained in effect as modified by this.

Q. I think my question may have been badly framed. I'll try again.

Were any rates of pay, rules and working conditions, other than the basic agreements for the operating crafts or classes, as amended by the November 2nd notice, in effect after February 25, 1964? A. After February 25, no.

Q. Would this letter refresh your recollection, sir? (Tendering instrument to the witness) This is Plaintiff's Exhibit No. 5. A. (Witness examining exhibit)

Q. Now, having refreshed your recollection, sir, I repeat: Were any rates of pay, rules and working conditions other than the November 2nd, 1959 notices, amending the basic agreements, and the basic agreements themselves in effect after February 25, 1964? A. No, sir.

We've complied fully with the rules, as amended, since that time.

Q. Mr. Wyckoff, there is a statement in your letter of February 24, 1964, to Messrs. Bolin, Lemmon & Kitt, of the Conductors, Locomotive Engineers and Locomotive Firemen and Enginemen, respectively, that the work rules placed into effect on November 4, 1963, and not held in abeyance pursuant to C.A. 63-260-Civil-J, remain in full force and effect.

What did that have reference to, sir? A. That had reference to the September the 24th notice—September 25th notice that those—that notice was later withdrawn subsequent to the date of this letter.

Q. But after February 25, you had your "Uniform Working Agreement" for operating employees in effect? A. After February 25?

Q. Yes. A. No, we did not.

Q. Mr. Wyckoff, your letter of February 24, 1964, states that the work rules placed into effect on November 4, 1963, and not held in abeyance pursuant to Civil action 63-260-Civ-J, remain in full force and effect.

Didn't that mean that the uniform working agreement for operating crafts or classes was in full force and effect?

134 A. It was our position that it was, but there was a dispute as to it, so we simply withdrew the notice.

Q. But it was in effect until you withdrew it? A. We didn't apply it. We applied the rules, the original rules modified by the 1959 rules, amended February 25th.

Q. So then, you told the labor organizations that it remained in effect but it really wasn't in effect; is that right?

A. We didn't work under it. We worked under the old rules, because there was a dispute as to whether or not it was in effect. It was our position that it was. It was their position that it was not. They wrote me to that effect. So we simply withdrew it.

Q. Well, until you withdrew it, it was in effect? A. No, we didn't apply it.

Q. But you gave notice that they were both in effect; is that right? A. Well, that's correct, yes. But we didn't apply it because of the dispute.

Q. So you had the November 2nd, 1959, notices in effect and you had the "Uniform Working Agreement" in effect, but not in effect; is that right? A. It was our position that

135 it was in effect. As I say, it was disputed, and since we had a legal right to put the November 2nd, 1959 rules into effect, we put this in effect and worked under them since February 25th.

Q. Now, you stated in this letter also that:

"The work rules held in abeyance pursuant to Civil action 63-260-Civ-J are reinstated and made fully effective as of 12:01 a.m., February 25, 1964."

That was your intent, to put the entire "Uniform Working Agreement" for operating crafts or classes into effect, was it not? A. It was our intent but, as I say, the labor organizations disputed our right to do so and we simply withdrew it.

Q. But this letter—well, let's see, perhaps we should ask a question or two to clarify this, Mr. Wyckoff. I'm puzzled.

Your letter states:

"Upon the expiration of P.L. 88-108, the Carrier will at 12:01 a.m., February 25, 1964, withdraw its Notice of August 29, 1963, withdrawing the work rules placed in effect at 12:01 a.m., on July 2, 1963."

To what did that have reference? A. As a result
136 of the enactment of Public Law 88-108 and action of this Court, we were forced to withdraw certain rules.

Q. What rules were they sir? A. The working rules applying to the three operating crafts, other than the Trainmen.

Q. And what working rules were they? What notice were they under? A. They were under our notice of September 25.

Q. I think you're—I am sure this is just a momentary confusion, sir.

"Upon the expiration of P.L. 88-108, the Carrier will at 12:01 a.m., February 25, 1964, withdraw its Notice of August 29, 1963."

A. I got the wrong date. August 29 is correct.

Q. So that what you are referring to is the November 2nd, 1959, notice; is that right? A. November 2nd '59 notice was put into effect February 25.

Q. Yes. And this is the language giving notice you were putting it in effect; is it not? Would you like to examine it? (Tendering instrument to the witness) A. That's correct.

137 Q. And now you go on to state:

"The purpose of reinstating these rules as of 12:01 a.m., February 25, 1964, even though they have been superseded and replaced by the rules placed into effect on November 4, 1963, is to reaffirm the conditions that existed prior to August 29, 1963."

Did that mean that the November 2nd, 1959, notices were being placed in effect even though they had been superseded and replaced by this "Uniform Working Agree-

ment"? A. The notices were November 2nd, 1959 notices, were put in effect prior to August. They were withdrawn as a result of the enactment of Public Law 88-108. Then when that Law expired, we had a right to put the notice back in effect, simply withdraw the withdrawal of it, which we did.

Q. But your letter states, and you may examine it if you wish, that the purpose of reinstating these rules—referring to November 2nd, 1959, rules—

“even though they have been superseded and replaced

by the rules placed into effect on November 4, 1963, is

138 to reaffirm the conditions that existed prior to

August 29, 1963. In other words, even though

superseding rules are now in effect, the Carrier is aware

that you disputed the right of the Carrier to place the

superseding rules into effect on November 4, 1963, and

that the Mediation Board has docketed your application

for mediation in this matter as Case A-7056.”

And there were some statements about your difficulties of bargaining.

Now, what you did, I take it, is that you stated that you had superseded the November 2nd, 1959, notice by the “Uniform Working Agreement” of September 25, and you were placing the November 2nd, 1959, notice into effect even though the superseding rules are now in effect, I think are the words in the letter.

Is that what you wanted? Them both in effect; is that right? A. It was our position that the superseding rules were in effect. However, that position was not agreed with by the labor unions or the Mediation Board and, as I said a minute ago, subsequent to the notice, we withdrew the rules that were disputed and left in effect the

139 November 2nd, 1959, notice.

Q. Mr. Wyckoff, I show you a letter dated March 9, 1964, addressed to the General Chairman of the Locomotive Engineers, the Conductors and Brakemen, and the Locomotive Firemen and Enginemen.

Now, is this the notice which you gave that you were withdrawing the "Uniform Working Agreement" which you put into effect on November 4, 1963, and continued in effect until February 25, 1964? A. That's correct. It states that:

"Effective 12:00 p.m. today, March 9, 1964, the notice of September 25, 1963, is withdrawn."

Q. So that the "Uniform Working Agreement" are, as of March 9, 1964, finally withdrawn as to these three organizations? A. That's correct.

Q. Have they been withdrawn with respect to the Brotherhood of Railway Trainmen? A. No. We are still negotiating with the Trainmen.

Q. Mr. Wyckoff, would you identify this, if this is the letter? This is your notice, is it not? A. Yes. It is the letter I wrote of March 9, 1964, to the General Chair-
140 man of the Brotherhood of Locomotive Engineers, the Order of Railway Conductors and Brakemen, and the Brotherhood of Locomotive Firemen and Engineers, notifying them of the withdrawal that date of the notice of September 25, 1963.

(Mr. Shapiro tendering instrument to Mr. Devaney)

Mr. Shapiro: I ask that this be marked as the Plaintiff's next exhibit.

The Clerk: 7.

Mr. Shapiro: And received in evidence.

(Thereupon, the referenced material was received and filed in evidence as Plaintiff's Exhibit No. 7.)

By Mr. Shapiro:

Q. Why did you withdraw the "Uniform Working Agreement" of September 25, 1963, on March 9, 1964? A. There was a dispute as to whether or not it became effective and, to avoid that dispute, we simply withdrew it.

Q. Did you give any consideration to the judgment of this Court in Brotherhood of Railway Trainmen against the Florida East Coast Railway Company? A. Did we give any consideration?

Q. In deciding to withdraw the "Uniform Working Agreement"? A. I won't say that that was not a part of the consideration, but the basic consideration was the dispute as to whether or not it was in effect.

Q. Now, Mr. Wyckoff, if for any reason you were unable to—if you were enjoined from operating under the November 2nd, '59 amendment to the basic working agreements and the basic working agreements themselves, would you revert to some sort of emergency condition? A. If we were enjoined from working under any agreements, I suppose we would have a free hand to do as we pleased. I can't reconcile that such a situation could occur.

Q. The question was badly phrased.

If you were for any reason prevented from operating under the November 2nd, 1959, amendments to the basic agreements and were required to revert to the basic agreements as they stood prior to that amendment, would you continue to operate under the basic agreements? A. The basic agreements would remain in effect.

Q. Would you continue to operate under them? A. We would be forced to deviate from them because of the shortage of manpower, until such time as the strike ends.

Q. Would you re-adopt the "Conditions of Employment"? A. We would be forced to in order to serve the public.

142 Q. Mr. Wyckoff, with respect to your operating crafts or classes at the present time and recognizing that you are operating under the agreements as amended by the November 2nd, 1959, amendments, do you face any difficulty in carrying on your operation as— A. We don't have a surplus of men. I'll put it that way, if that's what your question is directed to.

Q. As the—as your operation—are you familiar with the operations of the carrier? A. Yes, I am.

Q. As your operations are being conducted today, do you have a sufficient force to operate your trains? A. We have sufficient force to comply with the rules, as they are amended by the 1959 notice. Now, there may be some infraction of the rules. That will be, of course, a minor dispute.

To the best of our ability, we are complying with those rules, as amended.

Q. How many employees do you require to—how many operating employees do you require to maintain your present level of service? A. I don't have the exact figures with me. We have sufficient manpower now to maintain the present level of service under the rules as they have been amended.

143 Q. Could you state that present level in terms of percentage of your freight capacity? A. The number of employees that we have now?

Q. No, could you state the present level of service in the terms of percentage of your freight capacity? A. I would say that we are operating at approximately 95 percent of the capacity that was operated at prior to the time of the strike.

Now, with respect to car-load freight, in many instances it's much more than we handled before the strike.

Q. Have you had any difficulty in recruiting employees? A. We haven't had difficulty recruiting employees. It takes time to train them, though.

Q. Well, from the standpoint of a long-range program, are your personnel requirements satisfactory now? A. Yes. We have a satisfactory number of applicants and we train them as we employ them.

Q. So that would you say that your present operating situation is an emergency situation? A. I wouldn't say it was an emergency situation at this date with respect to freight service, no.

Q. Now, with respect to your operating employees, are the "Conditions of Employment" substantially similar to

the proposal of September 25, 1963? I can show you
144 both of the documents, if you wish to compare them.

A. There's a similarity, marked similarity, between the two. The uniform agreement was modified to present language in the form of a working agreement.

Q. You say the uniform agreement was modified to present language in the form of a working agreement?

A. That's correct.

Q. You mean, first came the uniform working—no, I don't understand your answer, sir. Let me— A. The "Conditions of Employment", as I told you before, were formulated to cover conditions that arose as a result of the strike. Subsequent to that time, a notice was served of a desire to enter into a uniform working agreement.

Now, the proposal was so worded to conform to the format of a working agreement. The "Conditions of Employment" were not.

Q. Leaving out the formality of wording and turning to the rates of pay, rules and working conditions in the "Conditions of Employment" and the rates of pay, rules and working conditions in the September 25 notice, are they substantially similar as applied to the operating crafts or classes? A. I would say substantially, yes.

145 Q. Are there differences? A. There may be minor differences. I would have to compare them to point those out.

Q. Would you like to skim these briefly to point out the differences which you think are at all significant? A. Well, for one thing, the "Conditions of Employment" apply to all of the employees, operating and non-operating.

The uniform agreement applied only, in this case, to the operating crafts, in this that you showed me here. The others applied only to the non-operating crafts.

Therefore, there were certain rules in the non-operating agreement that did not or were not set forth in the "Conditions of Employment". In other words, there were no similar conditions in the "Conditions of Employment".

Q. Now, with respect for the moment to the operating crafts or classes and ignoring the portion of the "Conditions of Employment" that are exclusive to the non-operating crafts or classes, if there are any, what significant differences are there between the two documents? A. Well, the agreement contains a preamble that the "Conditions of Employment" does not.

There is a provision in the proposed uniform agreement covering what will govern in the case of work stop-
146 pages. That is not present in the "Conditions of Employment."

There is a provision for representation in the uniform agreement.

Q. Now, in what respect is representation? What does that mean? A. It says:

" 'Duly accredited representative' or 'accredited representative' as used in this agreement shall be understood to mean the regularly constituted committee, or officers of organizations parties to this agreement."

Q. Thank you. A. There is a provision covering issuance of free transportation to employees and their dependents.

Q. Is that in the permanent— A. That's in the agreement, in the proposed agreement. It's not contained in the "Conditions of Employment".

There is another provision with respect to physical examination that is contained in the "Uniform Working Agreement".

There is a retirement rule provision that is contained in the "Uniform Working Agreement".

There is a rule covering health and welfare
147 benefits for employees that's contained in the "Uniform Agreement".

There are articles pertaining to electric lanterns, to held-away-from-home terminal time, to calling of crews, to uniforms for employees that perform service requiring wearing of uniforms. Those are not contained in the "Conditions of Employment".

Basically, those are the deviations and there are quite a few changes in language.

Q. Now, with respect to the matter of classification of job rates—of jobs and rates of pay, I take it that the two agreements are substantially similar; is that right? As applied to the operating crafts or classes? A. That's correct.

Q. And with respect to seniority? A. Basically, yes.

Q. Leaves of absence? A. Yes.

Q. Of bulleting procedures? A. Yes.

Q. Basis of pay? A. As I told you, all the rest of the articles are basically the same. There are differences of wording, but basically they are the same.

Q. Well, just to go through the rest of these then,
148 we cover—I would like to go through them item by item, just to make the record, Mr. Wyckoff. A. All right.

Q. Reduction in force? A. I believe it's basically the same.

Q. Beginning of day? A. Yes.

Q. Recalling for service? A. Yes.

Q. Exercising seniority? A. It's basically the same.

Q. Starting time? A. Basically the same.

Q. Discipline procedures? A. (No response)

Q. Would you like to examine the documents? A. No, that's all right. (Examining instrument) That's basically the same.

Q. You are reading from a document you brought with you? A. I have a reproduction of the non-operating crafts—

Q. I see. A. —uniform agreement.

149 Q. Investigations? A. That's basically the same.

Now, you must understand, Mr. Shapiro, we are dealing with three—four separate organizations in—

Q. Yes, I'm reading from "Conditions of Employment" in calling off these items, you understand? A. Yes.

Q. Now, I think you testified that free transportation

was covered in the permanent September 25 proposal, which of course you've got in effect, but it was not covered in the "Conditions of Employment"? A. I believe that there is a deviation. I think it's covered for dependents also in the—

Q. Permanent? A. —uniform agreement.

Q. But it is covered with some additions? A. I think so.

Q. Vacations? A. Yes, the same.

Q. Vacation pay? A. Basically the same.

Q. Holiday pay? A. Basically the same.

Q. And new employees? A. Basically the same.

150 Q. Now, for the operating crafts or classes, more than one class of service? A. I don't think there is a counterpart to that in the "Conditions of Employment".

Q. What does that mean? "More than one class of service"? A. Well, a train crew could start a trip performing freight service and finish the trip performing passenger service. They would be performing two classes of service.

Q. I see. You have no passenger service at the present time, I believe? A. That's correct.

I don't see a counterpart in the "Conditions of Employment".

Q. No counterpart to "more than one class"? A. More than one class of service.

Q. You have an article listed as Item O-I. A. That says any employee may perform all services for which he is qualified.

Q. Would you like to read this item? (Indicating) A. Yes. It is basically the same as that contained in the executed agreement.

Q. It is the same? A. Yes.

151 Q. Calling crews? Held away from home terminal time; is that the same? A. I don't think that's in the "Conditions of Employment". I would have to check to be sure.

Q. I'm reading from it. A. Well then, it is.

Q. (Indicating to witness) A. Yes, it is basically the same.

Q. And going down the remainder—the remaining items: Calling crews? A. Basically the same.

Q. Crews called and not used? I think that's listed as "Called and not used". A. That's basically the same.

Q. Deadheading? A. Basically the same.

Q. What is "deadheading", sir? A. That's where you send a man on a trip to another terminal to return in service. And if he deadheads under orders and instructions from the Railroad, he is paid for riding.

Q. What do you mean when he "deadheads"? A. He doesn't perform service as such. In other words, he is not operating the train. He is just riding on the train.

Q. Extra board employees? A. Basically the same.

Q. Meal periods? A. The same.

Q. The items—so that the only items that are different in the permanent agreement and the temporary "Conditions of Employment" which were in effect were the preamble, work stoppage, representation, physical examination, retirement, health and welfare, electric lanterns and the uniforms of employees? A. I believe that's correct, yes, sir.

Q. And as to the other items—free transportation, you mentioned that that was modified? A. That's right.

Q. Held away from home time was the same, and calling the crews was the same? A. Yes.

Mr. Shapiro: I plan to turn to the non-operating side, Your Honor. Perhaps—

The Court: Perhaps it's a good place to break off. I was hoping you could finish your side but you are going to the non-operating side for awhile?

Mr. Shapiro: Yes, sir.

The Court: I imagine everybody would appreciate an opportunity to get a little lunch and refresh yourselves.

You have some papers to examine at lunch time, too, haven't you?

Would you be prepared to go ahead at 2:30? It's now 1:20. Is that all right with everybody?

2:30 this afternoon.

(Thereupon, at 1:20 o'clock p.m., on Tuesday, May 26, 1964, the Court adjourned to be reconvened at 2:30 o'clock p.m. of the same day.

At 2:30 o'clock p.m., on Tuesday, May 26, 1964, pursuant to adjournment of the preceding session, Court reconvened and the following further proceedings were had:

The Court: Suppose you come back to the stand, please.

Raymond W. Wyckoff

resumed the witness stand and further testified as follows:

154 The Court: You may proceed, Mr. Shapiro.

Mr. Shapiro: Thank you, Your Honor.

Direct Examination (Continued)

By Mr. Shapiro:

Q. Mr. Wyckoff, I think it has been previously established that the changes of September 24, 1963, as applied to the non-operating organizations were put into effect by the carrier on October 30, 1963; is that right? A. That's correct.

Q. At the present time, the "Conditions of Employment" of September 1, 1963, are not in effect for the non-operating employees; is that correct? A. That's right. We are operating under the rules put in effect on October 30.

Q. Now, this morning in discussing the non-operating—I beg your pardon—in discussing the operating crafts or

classes, we referred to a document which each employee was required to sign when he went to work, during the period that the "Conditions" of September 1, 1963, the so-called "Conditions of Employment" were in effect. You recall that.

Did that same rule apply for the non-operating
155 personnel? A. Each employee entering the service during the period involved signed an acceptance of —receipt and acceptance of the "Conditions of Employment".

Q. In discussing the non-operating organizations—I beg your pardon, Mr. Wyckoff.

In discussing the operating crafts or classes this morning, it was testified that the "Uniform Working Agreement" of September 25, 1963, was substantially the same with specific omissions, which you enumerated as the "Conditions of Employment".

Now, is that also true for the "Uniform Working Agreement" of September 24, 1963, as applied to the non-operating organizations? A. That's correct, yes.

Q. Would it be correct to state, Mr. Wyckoff, that the "Conditions of Employment", as applied to all crafts and classes of the carrier, were divided so as to set up a "Uniform Working Agreement" for the operating crafts or classes, which is the agreement of September 25, 1963, and to set up a "Uniform Working Agreement" for the non-operating crafts or classes of September 24, 1963? A. I'm not quite sure I follow the question.

The "Conditions of Employment", as I said this
156 morning, were simply a formulation of the conditions that arose during the period of the strike.

Then, on September 24 and 25, notices were issued to the organizations of the desire to revise the working agreements, the duly negotiated agreements, to the extent set forth in those notices.

Now, those notices were divided between operating crafts and non-operating crafts.

Q. When you drafted the notice of September 24, 1963, I take it you incorporated substantial portions, in fact, almost all of the "Conditions of employment" of September 1, 1963 as they applied to non-operating crafts or classes; is that right? A. Basically, that's true.

As I told you this morning, we changed the wording to comply with the format of the working agreement.

Q. And the same thing was true, I take it, with respect to the operating crafts or classes? A. That's correct, with the exceptions I mentioned this morning.

Q. Now, you've already testified that the agreements, that the September 24, 1963, "Uniform Working Agreement", as applied to non-operating crafts or classes, is substantially the same as the "Conditions of Employment."

157 Could you compare this copy of the September 24, 1963, proposal and the "Conditions of Employment" and tell me if there are any significant differences thereon?

I might say that this "Conditions of Employment" is not the one in the record. Would you like to have it?

(Obtaining exhibit from the Clerk and handing same to the witness)

Would it assist you if we went down specific items in the "Conditions of Employment" and call them off for you? A. I'll read each one as I go along and tell you, if I can, the changes in them.

Q. Fine. A. In the "Uniform Working Agreement", there is a preamble which is not present in the "Conditions of Employment".

Q. What does that preamble provide, Mr. Wyckoff? A. It states that:

"Except to the extent specifically restricted or limited by this Agreement the following rights of Management are possessed and shall be exercised exclusively and solely by the Florida East Coast Railway Company."

158 And it sets forth those rights and prerogatives of management.

Q. It's a reservation of certain matters; is that what it has the effect of being? A. That's correct.

Now, in the "Uniform Agreement" there is the added classification of Freight Accountant that doesn't appear in the "Conditions of Employment".

Q. Otherwise, as applied to the non-operating crafts or classes, are the classifications the same as in the agreement? A. I'm going through them, Mr. Shapiro.

Q. I'm sorry. Go ahead. A. There is the added classification of Junior Claim Clerk in the "Uniform Agreement" which does not appear in the "Conditions of Employment".

There is the added classification of Clerk in the "Uniform Agreement".

The rate for Baggage Clerks has been changed and the rate for Ticket Clerk has been changed.

There is the added classification of Key Punch Operator in the "Uniform Agreement".

There is the added classification of Utility Clerk.

There is the added classification of Crossing
159 Watchman.

Those are the changes I see in the rates of pay.

Q. Yes, sir. A. The manner in which seniority is established has been changed.

Q. In what respect, sir? A. The "Conditions of Employment" provided that new employees would establish seniority as of the first date on which compensated service is performed.

Q. And what did the "Conditions of Employment" provide? A. That was the "Conditions of Employment".

The "Uniform Agreement" spells out that:

"Seniority date for new employees will be established as of the date of entering the service."

The Court: What's the difference?

The Witness: There could be a considerable difference.

The Court: The date you enter service and the first date paid for service?

160 The Witness: No, sir. A man may enter the service and take his examination to become qualified for a given type job and not perform compensated service for a period of day or weeks.

By Mr. Shapiro:

Q. Is that the only difference in the seniority provision?

A. That's the only one I see thus far, Mr. Shapiro.

Q. All right. A. Now, the classifications used, modified to take care of the additions mentioned and the rates of pay, the additional classifications:

There is the added article with respect to work stoppage.

There is the added article for representation.

There is the added article for time limits for handling claims and grievances.

There is the added article for retirement.

An added article for health and welfare benefits.

An added article for electric lanterns.

The Court: Electric what?

The Witness: Lanterns.

161 There is an added article setting forth an exception to the basic day.

By Mr. Shapiro:

Q. What is that exception, sir? A. The article reads:

"When conditions beyond control of Management prevent employees from performing their normal duties, only the hours between the beginning and release from duty, exclusive of meal period, shall be paid for, with a minimum of two hours beginning allowed each employee who reports for duty."

Q. And does that include work stoppages? A. It could.

Q. I mean, it would be possible for you to negotiate a

provision in your collective bargaining agreement which would cover a strike-caused emergency? A. If an employee came to work and walked off the job, he certainly wouldn't be entitled to a full day's pay.

Q. That wasn't my question, sir.

My question was: It's possible for the carrier to propose a provision in the collective bargaining agreement which would cover emergencies created by strikes
162 and cover the manner in which the carrier may adjust its operations and handle its employees and employment relations? A. Uh-huh.

Q. Is that right? A. Well, this article could apply in such circumstances. For example, if the operating crafts were to go on strike and the management could not operate the railroad, then the non-operating employees could be sent home under this.

Q. Well, I— A. Principally it had to do with employees working outdoors in adverse weather conditions when they couldn't perform their work.

Q. Why don't you continue then with—I don't want to interrupt your examination of these documents. A. I think those are the basic changes, and many of the articles have changes in wording.

Q. Well then, with the exception of the items you have enumerated, the "Uniform Working Agreement" of September 24, 1963, for the non-operating personnel and the "Conditions of Employment" of September 1, 1963, are substantially the same; is that right? A. I think that's a fair statement, yes.

Q. Now, a moment ago I asked you whether the
163 carrier could negotiate proposed—to the labor organizations and negotiate under the processes of the Railway Labor Act a provision dealing with strike emergencies, and how it would handle its employment relations in such emergencies?

Mr. Devaney: Your Honor, I object.

I think this is totally immaterial as to what could be nego-

tiated in an agreement. I see no relationship to the present action whatever.

Mr. Shapiro: Your Honor, I think that it does go directly; as a factual matter, it goes directly to the witness' earlier testimony concerning the reasons for the temporary "Conditions of Employment".

I would like to demonstrate, if I may—

The Court: I'll permit the question and answer.

Go ahead and answer, please.

The Witness: I don't know of anything that can't be negotiated upon if the parties are willing to negotiate on those issues.

By Mr. Shapiro:

Q. Are you familiar in general with the terms of
164 the collective bargaining agreements for the several
classes or crafts of employees of the Florida East
Coast Railway Company? A. Yes, I am.

Q. Is there any provision that you can recall in any of those agreements which would authorize the establishment of the rates of pay, rules and working conditions expressed in your "Conditions of Employment" as a special emergency requirement resulting from a strike? A. I don't think it is spelled out in that language, no. But the employees certainly have a condition under the working agreement, too, to perform service.

Now, they didn't perform their service.

Q. Your answer, then, is that there is no such provision that you can recall in the agreement? A. I think I answered it the best I know how.

Q. Thank you.

Now, Mr. Wyckoff, if the Court were to enjoin the operation of the "Uniform Working Agreement" of September 24, 1963, would you revert to the "Conditions of Employment" of September 1, 1963? A. I'm not sure I follow the question.

Are you saying, if the Court were to find that the Sep-

tember 24 notice was not put into effect properly?

165 Q. Yes, if it were to enjoin— A. Then, what would we revert to?

Q. Yes. A. Obviously we would revert back to the last duly negotiated agreement, but we wouldn't be able to comply fully with those agreements because of the shortage of manpower.

Q. What would you operate under, Mr. Wyckoff? A. We would operate under those agreements to the extent possible, but we would be forced to deviate from the restrictive provisions, the featherbedding provisions of the agreements.

Q. What document, Mr. Wyckoff, would you look to find the rates of pay, rules and working conditions which you would apply to the employees on the job in the event that the September 24 "Uniform Working Agreement" were enjoined? A. We quite naturally would have to work under the conditions that were in effect during the period the "Conditions of Employment" were in effect.

Q. Then you would revert to the "Conditions of Employment" for operating purposes? A. As I have told you repeatedly, that is not a negotiated agreement.

166 Q. I understand. Subject to your qualification of what is in effect and what is not in effect, your actual operation would be under the "Conditions of Employment", would it not? A. Of necessity, we are certainly obligated to perform service to the public.

Q. Just answer the question, please, A. I'm trying to, Mr. Shapiro.

The Court: Well, you've made your position sufficiently clear in this respect without repeating it every time there is a question in that area.

You would revert to the "Conditions of Employment", as far as—

The Witness: As far as—excuse me.

The Court: —rates of pay, rules and working conditions?

The Witness: Your Honor, as far as an agreement is concerned, we would revert back to the negotiated agreement.

The Court: I'm talking about what the men would work under.

167 The Witness: Well, we would have to work in conformity with the conditions that grew up during the period of the strike and set forth—

The Court: And set forth in the "Conditions of Employment".

The Witness: —in the "Conditions of Employment", that's correct.

By Mr. Shapiro:

Q. Mr. Wyckoff, would your answers respecting the personnel situation of the railroad, as were given with respect to the operating employees this morning, apply to non-operating people as well?

Would you rather I develop the questions specifically?

A. Well, I would like to know what answers you are speaking of.

Q. All right, I'll try to be more specific.

From the standpoint of a long-range program of employment capabilities under your present staffing arrangement, do you face an emergency situation of any kind?

A. No. We have sufficient manpower to work under the October 30, 1963, agreement.

Q. And if you were required to revert—if you
168 were required to abandon the "Uniform Working Agreement" of September 23, 1963 and reverting your operation subject to your qualification to the "Conditions of Employment" of September 1, 1963, would you consider that an emergency situation? A. We could operate under the "Conditions of Employment", since they are quite comparable to the new rules.

Q. They are quite comparable to the new rules? A. With the exceptions that I developed before.

Q. Now, Mr. Wyckoff, you testified, I believe, that the "Conditions of Employment" were developed to meet the emergency; did you not? A. I said the conditions arose during the period of the emergency.

Q. Thank you, I stand corrected.

The conditions arose during the period of the emergency and this document, I take it, as an embodiment of the practices which you developed during the period of your emergency; is that right? A. Nothing more than reducing to writing those practices which developed.

Q. You changed the seniority rule, did you not, 169 Mr. Wyckoff? A. Yes, that's different than the rules that were in effect formerly.

Now, the rules that were in effect formerly were not changed as a result of the "Conditions of Employment" but as a result of the September 24 notice, which became effective October 30.

Q. Well, let's say you operated under a different seniority rule under the "Conditions of Employment", did you not? A. That's right.

Q. Now, what was the emergency situation which led you to change your seniority rule? A. The featherbedding rules of the various craft agreements, strict seniority lines. In fact, it even went farther than that. Some of the crafts had seniority districts and groups in the respective seniority districts and an employee of one group could not perform the work of an employee in another group, or the employee in one seniority district could not perform the work of another employee in another seniority district, or the employee represented by one organization could not perform the work of an employee represented by another organization.

Mr. Wyckoff, have you had any trouble recruiting 170 replacements? A. In the last several months, no.

We have been able to recruit them. The training is the problem.

Q. Did you have any trouble recruiting them earlier,

say, in October, 1963? A. We didn't have a plentiful supply. They were becoming more available.

Q. Now, could you hire replacements to operate under the existing seniority rule? Leaving out the question of costs, could you hire replacements? A. We could hire any number of people but just having people doesn't mean anything. You have to train them.

Q. Was it a question of training which led you to abolish the seniority rule and substitute the seniority rule in the "Conditions of Employment"? A. Mr. Shapiro, the "Conditions of Employment" did not abolish the seniority rule.

Q. I understand. Which led--A. We deviated from the seniority rule, in effect.

Q. Was it training that led you to do this? A. It was a need to utilize the available work force to the greatest degree possible. That is what led to it.

Q. But you say you could have expanded your work force by hiring more replacements? A. I said we could hire any number of people. I said it took time to 171 train them.

Q. Is cost a factor in the hiring of replacements? A. Not at that time. We were hiring them and training them just as fast as we could.

Q. If you could have complied, could you have hired replacements complying with the existing seniority provisions? A. Now, what period of time are you speaking of, Mr. Shapiro?

Q. Well, let's take the period after September 1, 1963, when the "Conditions of Employment" were published. A. Yes.

Q. Could you have hired replacements in line with the existing seniority provisions? A. We were hiring and training just as fast as we could at that time. We did not have sufficient to comply with the seniority requirements of the working agreements.

Q. Your statement is that you couldn't hire enough personnel to comply? A. I didn't say that. I can go out

and hire any number of people, but just having manpower available isn't of any value to the railroad unless they are trained to perform some function.

Q. Mr. Wyckoff, did you—I shouldn't say "you"
172 —did the carrier abolish the non-operating positions in January of 1963? A. The organizations notified the carrier that they were going on a legal strike. They also issued strike calls to their employees stating therein that no employee that they represented would perform any service for the railroad. As a result, the carrier issued notices to the individuals that, if the strike began, one minute thereafter their jobs were abolished.

Q. And did you thereafter reestablish positions? A. On February the 3rd, we resumed a limited operation. And at that time we started re-bulletining jobs to the extent that we could utilize the people.

Q. To the extent that you could utilize the people? A. That's right. In other words, at that time, we were only operating one train in each direction. Now, we advertised sufficient non-operating jobs to take care of that operation. We got no bids.

Q. But you did find replacements after the negative result on the bids? A. We embarked upon a hiring and training program, yes.

Q. If cost had not been a consideration, could you have hired and trained and obtained a sufficient working
173 force complying with the collective bargaining agreement's seniority provisions? A. I would say no.

Q. What would be—A. We hired them and trained them just as fast as we could.

Q. What is it that would prevent you from complying with the collective bargaining agreement, the seniority provisions? A. When? Today?

Q. At this time. A. Because we have the other agreement in effect, the October 30 agreement. We are complying with those seniority provisions.

Q. I'm sorry. In my question I shouldn't say "at this time", meaning today, but between September 1, 1963,

let's say, and October 30, 1963? A. We didn't have sufficient manpower to comply with the various restrictions and regulations.

Q. But you could have operated on a reduced basis, I take it, if you tried to comply? A. Mr. Shapiro, we certainly have an obligation to perform to the greatest degree possible the service which the public needs require and is entitled to receive.

174 Q. You didn't answer my question. A. I thought I did.

Q. The question was: You could have operated on a reduced basis if you had complied, could you not? A. It would have been a very reduced basis and it would not have been fulfilling our obligation to the public.

Q. But you could have operated? A. On a very restricted basis, yes.

Q. Now, you reclassified jobs in the "Conditions of Employment", did you not? A. The "Conditions of Employment" set forth certain different classifications than those contained in the working agreements at the time, yes.

Q. What did that have to do with the emergency? A. They were consolidated jobs; jobs that performed functions formerly performed by several employees on more than one position.

Q. Do you have a provision in the "Conditions of Employment" relating to assignments? A. Yes, there is. You mean bulletining of positions?

Q. No, sir. Would you read the first item in the contents of the envelope. (Tendering to the witness) A. It states:

175 "Employees will be required to perform any work designated by their superiors for which they are qualified, titles or qualifications of employee's position in no way restricting such employee from performing any such work"—"any such service"—I'm sorry.

Q. Now, the purpose of this provision, I take it, was to make available each employee to do whatever was needed

to be done in the face of any given emergency; was it not? A. Well, the positions themselves were, in most cases or many cases, consolidated positions.

Q. I'm talking about the assignment provision you just read. That's what I'm talking about.

Now, if a person, while working on one of those so-called consolidated positions, was qualified to perform a given function on another position, he of course was obligated to perform it.

Q. But you also felt obliged to reclassify all the jobs; not all the jobs, but to set up a different classification of jobs. Is that right? A. The classification set forth in the "Conditions of Employment" is different than that set forth in the working agreement in effect.

176 Q. Now, you established the seniority listings.

Do you recall how this system of seniority listings—I believe the term is seniority roster—operated? A. There were master seniority classifications and sub-classifications.

Q. Did you change these classifications from the existing collective bargaining agreements? A. Once again, Mr. Shapiro, they are different than the existing collective bargaining agreements but this did not change the existing collective bargaining agreements.

Q. Why did you feel obliged to set up separate seniority rosters if this was just an emergency situation? A. In order to uniformly assign the employees as they made bids for positions.

Q. You changed the—the "Conditions of Employment" have a provision dealing with reduction in force, which which states that:

"When forces are reduced, fitness, ability and seniority will prevail."

Was this in accordance with the existing collective bargaining agreements? A. The existing collective

bargaining agreements have provisions somewhat comparable.

177 Q. Do they have provisions which turn on seniority alone or on fitness and ability as well? A. Most of them have a provision for both, seniority and fitness and ability.

Q. Do you recall any agreement which does contain such provision? A. Oh, the Supervisors' Agreement has such a provision. I believe the Clerks' Agreement has such a provision.

These are the agreements that were in effect prior to October 30.

Q. Now, do the shop crafts' provisions have such an agreement? A. You mean do the shop crafts' agreements have such a provision?

Q. Yes, I'm sorry. Do the shop crafts' agreements have such a provision? A. I would have to refer to the agreement.

Q. Is this agreement among the documents you brought with you under subpoena? A. Yes, it is.

Q. Would you find it? A. It will require taking these all out, Mr. Shapiro. They all look alike from the top.

Q. I have been handed a copy— A. Here it is.
178 (Indicating)

Q. Oh, you have it? Good. A. (Examining instrument)

Q. Mr. Wyckoff, to expedite matters— A. It is provided for by Rule 16, Reduction of Forces; it provides that seniority will prevail and that employees who are cut off will be permitted to displace junior employees; but of course, they couldn't make such displacement unless they were qualified.

Q. If they hold a job classification, I take it that establishes that they are qualified under the agreement? A. Yes.

Q. Since the provision— A. I would say it probably would, in most cases, yes.

Q. Now, who is the judge of fitness and ability under your "Conditions of Employment"? A. The Supervisor in charge.

Q. Of the railroad? A. Right.

Q. You have provisions in the "Conditions of Employment" dealing with vacations? A. Yes, we do.

Q. You changed those from the existing collective bargaining agreements. I take it those are different, let's put it? A. They are different, that's correct.

Q. What is the emergency provision which required you to make the employment—the vacation provision different? A. Well, for one thing, the agreement contemplated different methods of computing qualifying service, which requires extensive accounting.

Q. And was it more convenient and inexpensive to do it without the necessity for the accounting? A. The "Conditions of Employment" simplified the manner in which the accounting will be kept in order to determine who is qualified for vacation and who is not.

Q. Now, Mr. Wyckoff, you have in your hand the so-called Shop Craft Agreement.

The Court: What kind of agreement?

Mr. Shapiro: The Shop Craft Agreement.

The Court: Yes, sir.

Mr. Shapiro: Perhaps we should single this item out and mark it as item 4.

180 The Clerk: C.

Mr. Shapiro: C. And it has already been received, I believe.

The Clerk: That's right.

Mr. Devaney: You are marking 4C the manila envelope containing everything else, the books?

The Court: No. 4 is the whole thing.

Mr. Devaney: All right.

The Court: And anything we pull out, we give it a letter.

Mr. Devaney: All right. 4C then.

(Thereupon, the referenced document was received and filed in evidence as Plaintiff's Exhibit 4C.)

By Mr. Shapiro:

Q. There is in that agreement a series of items entitled "Protection of Employees". These are listed in the index, the various pages of the agreement.

Are these safety provisions, Mr. Wyckoff? A. The best way to tell is to refer to them.

181 Rule 40 says:

"No employee will be required to work under a locomotive or car without properly protecting himself with prescribed signals."

Q. And that rule—I don't think we need to read the entire rule, but that's a safety rule.

Now, are there other safety rules in the agreement under the heading of "Protection of Employees"? A. Well, Rule 113, captioned "Protection for Welders".

Q. And what others are there, sir? A. 135 is captioned "Protection for Employees", but has to do with sheet metal workers.

Q. And what others? A. 153 is captioned "Protection for Car Repairmen".

Q. These are all safety provisions which are incorporated into the actual working agreement; is that right? A. That's right.

Q. And do you have any items of that nature in your "Conditions of Employment"? A. No, it isn't spelled out in the "Conditions of Employment".

Q. What was the emergency reason for not complying with the protection provisions? A. I didn't say we didn't comply with the protective provisions. I said it simply wasn't set forth in the "Conditions of Employment".

Q. But aren't the "Conditions of Employment" the sole conditions under which an employee on duty works? A. Not the sole conditions, no.

Obviously, to provide safe equipment and a safe place to work is a responsibility of management.

Q. It's apparently a responsibility which was controlled by the collective bargaining agreement until the "Conditions of Employment" were applied to each employee; is that right? A. That's not correct, Mr. Shapiro.

Many agreements had no comparable provision whatsoever, but that doesn't mean that we can provide the employees with an unsafe place to work.

Q. Well, this may ultimately go to consequence, but the point is that you don't have any equivalent of that in your "Conditions of Employment", do you? A. That's correct.

Q. And that the "Conditions of Employment" are the exclusive items under which you work; isn't that right?

A. As I said before, they simply reduce to writing
183 the conditions which grew up during the period of the strike.

Now, certainly there are other things over and above those set forth which would apply, such as providing a safe place for the employees to work.

Q. Mr. Wyckoff, you changed the basis of pay from what was set forth in the agreements. What was the emergency requirement that led to that? A. Well, there again, when the strike first began, because it was difficult to secure employees, many of them that came to work were not interested in working on an hourly basis. They asked for some sort of indication as to how much they were going to receive by the week or the month. So, in those cases, we gave them a monthly rate.

Now, as manpower became a little more plentiful, we endeavored to get back to the hourly rates and, by September the 1st, we had restored a number of the positions on an hourly basis.

Now, we included in those hourly rates payment for the

holidays, seven paid holiday, as such. There again is a complicated arrangement under the old agreements for determining when an individual is qualified for holiday pay. He must, in some cases, perform service on eleven days in the thirty-day period preceding the holiday; be available the day before, the day after, and on the holiday—
 184 things such as that.

We simply didn't have the manpower to maintain those sort of records so, to simplify it, we included in the basic rate an amount which would compensate for the seven holidays, as such.

Now, if the man worked on the holiday, he got an additional amount, he got time and a half for working.

Q. Could you have hired sufficient employees to keep your books to the extent that bookkeeping was a factor in your—again, in your non-compliance with the existing agreements, this difficulty could have been avoided? A. Obviously, Mr. Shapiro, you are not familiar with the various methods which are necessary to maintain records in order to enforce these various agreements. That one was just one of the few of the—one of the many, I should say, that are involved.

Now, you can go out and hire bookkeepers or you can go out and hire clerks, but they are not skilled or trained to maintain the records necessary under these agreements.

Q. Could you train them? A. Surely, you can train them but it takes time.

Q. At the present time, do you have sufficient trained personnel to carry out your operations? A. Under
 185 the existing agreement, the October 30 agreement, yes.

Q. Could you have acquired by the present date and trained sufficient personnel to live under the agreements as they stood prior to October 30, 1963? A. I would say no, not in all cases.

Q. Could you do it in some cases? A. Perhaps in some classifications, yes. In others, no.

Q. What are the classifications in which you would not be able to do it? A. Well, the ones that require more extensive training—the timekeepers, for example, must be familiar with each of the agreements in order to know how to maintain his records.

Q. Did you make any effort to train timekeepers for that purpose? A. We did, during the period that the "Conditions of Employment" were in effect. We trained or endeavored to train some men for it. When the agreement was placed in effect on October 30, we utilized those men—one man, I should say, in a different field.

Q. What other classifications have you found it difficult to train people in? A. Well, all the skilled
186 classifications require time to train the men.

Q. Had you hired replacements in a sufficient number to operate under the existing bargaining—collective bargaining agreements, could you have had them trained by now? A. Are you speaking of the October 30 agreement?

Q. No, sir, after the strike began? A. Yes.

Q. And you began an effort to restore operation, had you gradually hired replacements in a sufficient number to restore operations, could you have trained a sufficient number to operate under the collective bargaining agreements? A. As of today, no.

Q. As of today, your answer is no? A. That's correct.

Q. Why couldn't you hire a sufficient number to train to carry on under the existing collective bargaining agreements? A. As I told you before, it's not a question of hiring individuals. You can hire practically any number of individuals you need but you can't train them.

Now, certain classifications require extensive training.

For example, a Section Foreman, you can't make a
187 Section Foreman overnight. It takes a prolonged period of time, I would say perhaps a year, in order to train a man from scratch to be a Section Foreman.

Q. How long has the strike been in effect now? A. Well, it's going on 18 months.

Q. And you had a year in which to train a Section Foreman? A. Well, Mr. Shapiro, you can't bring in a whole group of individuals and start training them all at one time.

The Court: Just answer the question, would you please. It would save a great deal of time.

The Witness: I'm trying to, Your Honor, but Mr. Shapiro seems to think—

The Court: He is asking you, had you had a year?

The Witness: We have had a year, yes.

The Court: All right. That's all you need to say.

The Florida East Coast has attorneys here that will argue this matter. We don't need the witnesses to argue it.

188 By Mr. Shapiro:

Q. Did you hire any railroad people? A. We hired a few.

Q. Where did the bulk of your replacements come from? A. They made applications, came in off the street.

Q. Were many of them railroad people? A. No. I would say few were railroad people.

Q. Did you train these non-railroad people into railroad people? A. Yes, we did. We are in the process of training many now.

Q. So that you could, by carrying this on, train up to a point where your replacements could operate under the collective bargaining agreements? A. After an extended period of time, yes.

Mr. Shapiro: I believe that this concludes the direct examination of Mr. Wyckoff.

The Court: Do you have any examination?

Mr. Milledge: Yes, sir. I don't think it will take but a few minutes.

189 The Court: All right. You may proceed.

Further Direct Examination

By Mr. Milledge:

Q. Mr. Wyckoff, this strike began over a Section 6 notice issued by the eleven non-operating unions; did it not? A. That, and a counter-proposal by the Railroad.

Q. Now, just prior to the strike, what was the situation as far as between the parties, the bargaining position? A. The railway had made a number of offers to the employees, most of which were in excess of what they were demanding, but because they would not deviate from the national pattern, they turned them down.

Q. So they had demanded a raise in pay of essentially 10.28? A. The demand was for 25¢.

Q. Well, your bargaining was that they had asked for an amount and you had offered an amount, but it wasn't satisfactory and they went out on strike; is that right?

A. We offered an amount in excess of what they were agreeable to settling for on a national basis.

Q. Now, after they went out on strike, did you—I take it you did not implement your last offer? I mean, 190 you didn't— A. They never—

Q. You did not change the contract up? A. They never accepted the last offer. The last offer remained available for them to accept, until January 30th, a week following the strike.

Q. Right, but you don't take the position that the contracts were changed in any way? Nobody implemented any proposal or changed proposal or counter proposal?

A. The contract was changed as a result of the September 24th notice.

Q. Right. But between January 23rd and September 24th, nobody changed the contract or proposed to change the contract? A. That's correct.

Q. Right. You never proposed to implement your so-called counter-proposal which you initially made? A. No, we did not.

Q. All right. Now, I believe we have three areas of dispute:

You've testified that the "Conditions of Employment" are now out the window, so to speak. You don't claim you are operating under them as regards anyone, ops or non-ops? A. That's correct.

191 Q. Now, you did have union shop agreements with all of your non-ops, did you not? A. That's correct.

Q. It was the same agreement, however, for all of them? A. All of the non-operating crafts were parties to the same agreement.

Q. And one operating craft was a party to that same agreement, but wasn't the Brotherhood of Railroad Trainmen a party to that same agreement? A. I don't believe so. I would have to check it to see.

No, they were not.

Q. They had a separate union shop agreement? A. That's right.

Q. In any event, you proposed, in July, to abolish the union shop agreement with the non-ops? A. That's right. And in addition to them, with several of the other crafts that are not considered non-ops.

Q. Right. And a conference was held on your proposal? A. No, it was not. The employees refused to discuss the proposal because the Court Reporter was present.

Q. Representatives of all the non-ops met you and they met at a certain place; is that correct? A. Yes.

I agreed to meet with them at the Monson Motor Lodge for the purpose of discussing the agreement and proposed cancellation of agreements.

Q. Do you recall the date? Was that August 29? A. I believe that's correct.

Q. And then there was a disagreement over the Court Reporter; correct? A. They refused to discuss—enter into any discussion because the Court Reporter was there.

The Court: And you refused to dismiss the Court Reporter?

The Witness: That's correct.

The Court: All right. So there was a disagreement over the Court Reporter.

By Mr. Milledge:

Q. All right. And within ten days, on behalf of the non-ops, mediation was invoked? A. So the Mediation Board notified me, yes.

Q. All right. And you've taken—however, you took the position and have taken it ever since that, notwithstanding the invocation of the services that nonetheless, these 193 agreements were abolished? A. That's correct.

Q. Right. And so, of course you have refused to mediate the dispute with the National Mediation Board? A. Oh, no. The Mediation Board told me by letter that they had docketed the dispute and that they would send the Mediator to the property, consistent with other requirements.

Q. Then you wrote them and said that it was abolished? A. I wrote them and told them it was abolished, but I was perfectly agreeable to meeting with the Mediator. In fact, I have written to Mr. O'Neill to find out why a Mediator has not come on to the property.

Q. All right. But nonetheless, you've taken the position since that time that these union shop agreements do not exist? A. I take the position they have been cancelled, that's correct.

Q. All right. Now, you issued a notice on September 24 to the non-ops proposing this complete revision of all the non-ops' agreement? A. I served a Section 6 notice on September 24, yes.

Q. All right. And the same thing happened there as happened on the union shop agreement; is that correct? A. That's right. Contrary to their prior 194 policy, they refused to —

Q. Well— A. —discuss with me the notice, because a Court Reporter was present.

Q. All right. And they invoked mediation within ten days; correct? A. That's what the Mediation Board notified me.

Q. All right. And you wrote the Mediation Board and said you felt that mediation wasn't proper; right? A. That's correct. I told them that—

Q. All right. A. —that the employees failed to discharge their duties under the Railway Labor Act, and therefore did not have the right to invoke mediation.

Q. Yes, sir. A. However, the Mediation Board then wrote me and said that they had considered my position and, notwithstanding my position, they would send a Mediator to the property.

Q. Now, the "Conditions of Employment" which you say went into effect on September 1, 1963, that applied to all crafts, operating and non-operating? A. I didn't say the "Conditions of Employment" went into effect September 1, 1963.

195 Q. Right. It doesn't bear a date? A. The formulation was issued on September 1st, but those conditions had grown up during the period of the strike.

Q. Now, let's get one thing clear:

You represent to the Court that September 1st was the day you started handing out this document? A. That's correct.

Q. Was it not about the first week of July, 1963, that you actually started handing out this document? A. No, that is not correct.

Q. Who printed the document, Mr. Wyckoff? A. It was typed in my office.

Q. And duplicated there also? A. That's correct.

Q. Then you have records to indicate that September 1 was the day? A. That's right.

Q. But, in any event, you say it didn't go into effect. It was just followed? A. It was simply a written formulation of the policies that were being followed because of the strike conditions.

Q. And as far as the non-ops are concerned, the rules, rates of pay and working conditions contained in that document are the same ones that are in effect today?

196 A. There are some deviations, as I explained before.

Q. So at least as far as the non-ops are concerned, we originally started with what, 17 agreements? I mean, at the time of the strike? A. That's correct.

Q. Right. And you've consolidated them into one package; and since September 1st, you've followed that, those rules, rates of pay and working conditions as far as they are concerned up to the present time? A. No, since October 30, we've followed those rules,—

Q. I'm not— A. —working conditions, and so forth.

Q. Well, they are the same? A. Up to October 30, we were simply following policies which had grown up during the period of the strike.

Q. But they happened to be the same? A. Theoretically the same.

Q. I'm not talking about theoretical. A. Fundamentally the same, yes.

Q. All right. And of course, it's quite clear that the 17 agreements are markedly dissimilar from the "Conditions of Employment" and the September 24 agreement? A. In some respects, they are; in some respects, they are not.

197 Q. They are not the same? A. As I say, in some respects. For example, your leaves of absence rules are basically the same as they are in the new agreement.

Q. Well, if you were going to operate by the old agreements, you wouldn't have put the new ones into practice.

They have substantial material differences from the old agreements? A. That's correct.

Q. Right. Now, on the ops' side of this thing, you've been operating under this "Conditions of Employment"—and I mean operating, I'm not talking about the theoretical now—up to what point? A. February 25, we put into effect the 1959 revisions of the working agreements. And

following that time, we have complied with the '59 revisions.

Q. Now, you testified here on February 28, in the Trainmen case and we had a long discussion then, about why it was necessary for you to operate under the "Conditions of Employment", and you told the Court then, gave some attempted justification as to why you were operating under the "Conditions of Employment" at that time.

Did you not tell the Court in the Trainmen case, on February 28, that you were operating then under 198 the "Conditions of Employment"? A. I believe that

I told him that the employees had been paid up to that time under the "Conditions of Employment".

Now, the next pay period following the day I testified in Court was March 15.

Q. You didn't tell the Court you were operating under the '59 notice then, on the 28th? A. I don't think that question was asked me.

The Court: Well, it's asked you now.

You didn't say so, did you.

The Witness: Not to my knowledge, no, sir.

Mr. Milledge: Now, back last—

The Court: The only thing, Mr. Milledge, if there is any question about the testimony that Mr. Wyckoff gave before me on February 28 or whatever the date was in the Trainmen case, I think you better send for the file and read it and refresh his answer, if you want to nail it down.

That's a little—

Mr. Milledge: All right.

199 The Court: Do you have it there before you?

Mr. Milledge: I have it in the form in which it went up to the Court of Appeals on my pagination.

The Court: Well, if the other side has it by the same pages, I would think that would be sufficient. All the testimony went up, didn't it?

Mr. Milledge: All the testimony given before Your Honor went up.

The Court: The printed pages are different from the pages of the Reporter?

Mr. Milledge: That's the only difference.

Mr. Devaney: Your Honor, there is no difference. Both pages are given.

The Court: Sir?

200 Mr. Devaney: I say, there are no differences because both pages are given, if Mr. Milledge wants to read through the pages of the transcript.

The Court: I just wanted him to read from it so you could refer to it and check them.

Mr. Milledge: Mr. Devaney, I'm on page 144 of the printed transcript, on the bottom, the last question and answer; the last question on page 144.

Mr. Devaney: May I say, Your Honor, for the record, that the transcript number, page 68, as shown in the printed record; apparently now the small number on the left-hand side of each one of these pages indicates the original transcript page.

Mr. Milledge: Oh, yes. It is 68 of the way Mr. Sheridan typed it up.

By Mr. Milledge:

Q. I asked you the question, Mr. Wyckoff:

"What are you doing that's under the old contract? Are you doing anything that's under the old contract?

201 Name me, sir, one thing that you are doing that's under the old contract and not under your new 'Conditions of Employment' which are the same as your '63 Notice?"

And your answer was not that you weren't operating under the '63 Notice, the "Conditions of Employment", but your answer was:

"Anything that we can do with the manpower we have available, we do under the 1949 contract."

A. I think I also stated, Mr. Milledge, that Mr. Van Arsdall had been notified that the '59 rules had been placed into effect.

Q. Of course, we know, don't we, Mr. Devaney, when you say "in effect", you don't mean in practice, do you?

A. Are you speaking to Mr. Devaney?

Q. Excuse me, Mr. Wyckoff.

When you use the words "in effect", you don't mean it—you mean a change in the contract? A. That's correct. When you place into effect a change—

Q. Right. A. —it changes the contract.

Q. All right. But that, in your terminology,
202 that's not the same as what you actually do? It may or may not be? A. Well, you work under it to the fullest extent possible with the manpower available.

Q. We are just going back to words.

When you say "in effect", do you mean that always—do you always mean that's what you are actually doing?

The Court: When you say "in effect", you don't mean in practice, at least not necessarily?

The Witness: That's correct.

The Court: All right.

The Witness: When you place into effect a change, it changes the contract.

By Mr. Milledge:

Q. Now, back in the Government's suit last December, you were asked there what rules—back last December, under what rules were the people actually operating the trains. What were they working under?

Mr. Devaney: Your Honor, I object again. I
203 think this has all been gone into. It seems to me totally cumulative. Mr. Shapiro has gone into this question and I don't see any purpose in going over and over the same grounds again.

The Court: I can't tell whether this is the same ground Mr. Shapiro went over or not.

If you would refer to a particular question and answer in that other transcript, if it has already been brought out

by Mr. Shapiro, I don't see any reason to bring it out again. If it's another question and answer, then I—

Mr. Milledge: All right, sir.

The Court: You may examine him about it.

By Mr. Milledge:

Q. I will just show you this part of the excerpt, and if you would just read that for just a second.

Mr. Devaney: Your Honor, may I ask again that Mr. Milledge direct us to the part of the transcript he is referring to?

204 The Court: Well, I have a copy of the printed brief, the appellee's printed brief before the Court of Appeals, and I think you've shown him—

Mr. Milledge: Page 11.

The Court: Page 11 or page 7?

The Witness: Page 11, Your Honor.

The Court: Page 11; well—

The Witness: This is the portion that Mr. Shapiro referred me to this morning.

The Court: That's the same?

The Witness: Yes.

By Mr. Milledge:

Q. And what you testified there was that the people actually operating your trains were being worked under the duly negotiated contracts. That's what you told him? A. To the extent possible with the manpower available, that's correct.

205 Q. But they were actually being worked and paid under the "Conditions of Employment"? A. The "Conditions of Employment" were the policies that resulted from the shortage of manpower.

Q. Now, you tell us now that on February 28, the day that you gave testimony here last time, that these people were actually being worked under the '49 notices amended by the '59 notice? A. That's correct. And they were paid accordingly.

Q. All right. Now, I refer you to the transcript of your testimony the last time you were here, on February 28, which is page 136 of the printed record, on page 51 of the typed transcript of the hearing.

The question was asked:

"So you have been operating under"—
that's different than "in effect" now—

"So you have been operating under the 'Conditions of Employment', this document E, since September 1st, 1963, right on; is that correct?"

"Answer: That is correct, because of the fact that we had to provide service to the public and didn't have sufficient men to do it under the old agreement."

206 So last time you were here, you told us you were under the "Conditions of Employment". Now you say you really had done away with it by that time? A. Mr. Milledge, you construe a different intent from that remark than I intended by it. It certainly doesn't say what you say.

Q. All right. Maybe we can have one agreement on this thing.

Back last December, you didn't tell Judge Simpson that you were operating under the "Conditions of Employment". Whether you were asked it or not, you didn't tell Judge Simpson that you were operating under it? Whether you were asked it or not, is not part of my question; but that didn't come out, did it? A. I can't recall this date whether it did or not, Mr. Milledge. Whatever I told was the truth last December or any other time.

Q. And on—but you say you were in December last year, you were operating under the "Conditions of Employment"? A. That's correct.

Q. And you say that on February 28th, you weren't operating under them? A. Starting February 25th, we revised the '49 rules for Trainmen and the other
207 rules for the other operating crafts to conform to the '59 notice and—

Q. But as the testimony came to Judge Simpson last time, your testimony was that you were operating under the "Conditions of Employment"? A. I made no such statement that I can recall, Mr. Milledge.

The Court: He just read it to you.

By Mr. Milledge:

Q. All right. Now, there is just one other thing:

This item that you wrote on March 9, 1964, to Mr. Kitt, Mr. Bolin—which is the Plaintiff's Exhibit No. 7—also to Mr. Lemmon, this is the document by which you, as far as those three organizations go, by which you abandoned this September 25, 1963, notice; is that correct? A. We withdrew it.

Q. All right. Well, you abandoned it. It's a dead issue now, as far as those three organizations are concerned? A. That's correct.

Q. You had purported to put that notice into effect on November 4, 1963; had you not? The '63 notice? A. We contended it was, yes.

Q. That was the same as the "Conditions of Employment" for practical purposes? A. Fundamentally, yes.

Q. So, as a matter of actual fact, you operated, at least as far as those three operating organizations are concerned, under the same rates of pay, rules and working conditions which are essentially the same under the September '63 notice and the "Conditions of Employment"? As far as those three organizations are concerned, you operated under those rules, rates of pay and working conditions up to March 9; did you not? A. We contended those rules were placed into effect. The organizations disagreed with us and, on March 9, we withdrew them.

Q. The question was "operated", because we seem to have a little difficulty with the words "in effect".

You operated that way up to March 9, as far as those three organizations are concerned? A. That's correct.

Q. Now, is— A. Let's say up to March 9, you say; February 25th, we put into effect for them also, as well as the Trainmen.

Q. Let's abandon— A. The old rules—

Q. Let's abandon "in effect" and just talk about
209 "operate", because what we conceive we are concerned with here what people actually work under, and my questions are directed to what people are actually doing on your property. A. All right. On February 25th, for all the operating crafts, we adopted the '59 rules. The jobs were advertised in compliance with the '59 rules. We paid in compliance with the '59 rules.

Q. You go—On March 9th, did you go back and pay people the difference between the 25th and the 9th? A. We started paying people on February 25th in conformity with the '59 rules. Now, the first paycheck they received covering such allowances was on March 15.

Q. Yes, sir.

Mr. Milledge: That's all we have, Your Honor.

The Court: Mr. Devaney.

Mr. Devaney: Your Honor, first of all, since Mr. Milledge has read from page 51 of the transcript of the hearing; at page 136 of the joint appendix, an excerpt, I would like to call attention of the Court to the preceding—

210 The Court: Go ahead and read it into the record; it's all right.

Mr. Devaney: On page 51 of the transcript, immediately preceding the question Mr. Milledge read, there is:

"(Mr. Milledge conferring with the Clerk out of the hearing of the Reporter.)"

Then, Mr. Milledge:

"We will mark this C. C is the notice of July 31st, 1963.

"The Court: That looks awful black.

Is it legible?

"Mr. Milledge: The front side is fine, Judge.

"The Court: All right.

- "Mr. Milledge: I just have a cheap photocopy process."

Then comes the question which he read:

"So you have been operating under the 'Conditions of Employment', this document E, since September 1st, 1963, right, on; is that correct?"

The answer was:

"That is correct, because of the fact that we had
211 to provide service to the public and didn't have
sufficient men to do it under the old agreement."

Now, following this, page 53, Mr. Milledge again said:

"Now, you, in February—February 24, 1964, just this
week after this law suit was filed, you purported to issue
notice to Mr. Van Arsdall, the General Chairman of the
plaintiff, that you have now decided that you are going
to put the 1959 notice into effect; is that correct?"

"Answer: We withdrew the withdrawal of the rules
which were made effective several months ago, that's cor-
rect.

"Question: And is this a photocopy of your letter of
this week which you proposed to put the '59 notice into
effect? (Indicating)

"Answer: That's correct. That's a notification to Mr.
Van Arsdall.

"Question: And the attachment to it is what you pro-
pose to put into effect?"

"Answer: That's correct.

212 "Mr. Milledge: We will ask that this be marked.

"The Clerk: I.

"Mr. Milledge: Exhibit I.

"Mr. Devaney: No objection."

Now, there are other references which could be made,
Your Honor, but I merely call this to the attention of the
Clerk—I mean of the Court that the inference which Mr.
Milledge draws is improper and I think that there is no
basis from the transcript of the hearing that was before
you that would indicate that there is any proper basis for
the statement that Mr. Milledge has made.

Cross Examination

By Mr. Devaney:

Q. Now, Mr. Wyckoff, you have testified that prior to October 30, 1963, that the agreement in effect as to the non-operating unions was the agreement that existed before the strike began; is that correct? A. That's correct. There were several agreements.

Q. Several agreements? A. That's correct.

Q. Now, you have also testified that because of the strike, you were forced to make deviations from
213 those agreements in order to operate; is that correct? A. That's correct.

Q. Now, you have testified that, in doing this, the strike justified the action that you took; is that correct? A. Yes, it is.

Q. If you were not correct—

The Court: What is the purpose of this series of leading questions?

Mr. Devaney: I simply wanted to lay the foundation for the question that I have now.

The Court: I won't permit you to lead him in this fashion any longer. You will have to put your questions to him and let him make up his own answers.

By Mr. Devaney:

Q. Mr. Wyckoff, if you deviate from the agreements, is there a right to file claims under those agreements for the difference between the pay or the deviation between what you have done and what the agreement provided?

Mr. Milledge: Objection; leading and asking for a conclusion of the witness.

214 The Court: Objection sustained. I take it you don't contend otherwise?

Mr. Rutledge: No, we don't, Your Honor, that's a matter of law.

By Mr. Devaney:

Q. Mr. Wyckoff, have the unions filed any claims or grievances contending that you have not complied with the agreements since the strike began? A. No, except for matters of discipline.

Q. And what have those matters of discipline—what has this related to? A. Disciplinary action taken against employees who are on strike that committed acts against the known interests of the railway.

Q. Now, Mr. Wyckoff, when you first began operations on February 3rd, what employees were available to operate the railroad? A. Only supervisory or excepted employees.

Q. How soon after February 3rd, approximately, did you hire the first employee in the non-operating class? A. The exact date, I don't know offhand; it was the latter part of February.

Q. Now, since that time, have you had a program
215 of recruiting and training new employees? A. Yes, we have.

Q. Has that program continued to the present? A. Yes, we are hiring and training employees as expeditiously as possible.

Q. Now, approximately how many employees in the non-operating crafts do you have at the present time? A. In round figures, 400.

Q. And you have testified that the railroad is now performing approximately 95% of the volume of business that it performed before the strike? A. That's correct.

Q. Now, if you could operate only under the terms of the agreements that existed before the strike, how many employees would be required? A. Discounting the need for employees in passenger service or for less-than-carload freight, I estimate it would take another 600 employees in the non-operating fields.

Q. Now, at the rate that you have been able to recruit and train new employees, how long would it take before you

could recruit and train this additional number of employees?

Mr. Milledge: I object. It's just speculation.

216 The Court: I'll take the answer.

The Witness: It would take, I would say, at least a year and a half.

By Mr. Devaney:

Q. I'm sorry, I couldn't hear. A. It would take at least a year and a half. We have been operating now just about that long and we have 400 employees, so another 600 would take at least that long.

Q. Now, without the additional 600 employees, if you could only operate under the terms of the agreements that existed before the strike, could you continue to perform the same business or carry the same freight you now carry? A. No, we couldn't. It would have to be drastically reduced.

Q. Do you have any idea, what your estimation is, as to how much reduction would be required? A. I would estimate in the neighborhood of 50%.

Q. Now, Mr. Wyckoff, what occurred when you first began employing new employees after the strike, as far as the rates of pay that they were paid when they came to work for the Florida East Coast? A. Well, as the individuals made applications for employment, naturally one of
217 their first concerns was how much money were they going to make. And as a general rule, when it was expressed in dollars and cents per hour, they indicated a preference that it be on a weekly or a monthly basis so they would have some idea how much money they would have at the end of that period of time. They were not familiar with the railroad operations or the railroad's method of payment, and for that reason, I assume they wanted to know how much they would get a month.

Q. Now, did you agree to pay them by the month? A. Yes, we entered into such agreement.

Q. How did you arrive at the amount of the monthly rate? A. We attempted to convert the rates that would apply to the type of work that they were performing and, in many cases, it would be more than one specific class of work; tried to convert it to a monthly rate.

Q. Did you attempt to maintain the rate structure that had existed before the strike? A. We—

Mr. Shapiro: Objection, Your Honor. That's a leading question.

The Court: I didn't catch it, Mr. Shapiro. I didn't
218 catch your objection.

Mr. Shapiro: I object on the ground the question is leading.

The Court: It's all right; go ahead and answer.

The Witness: We attempted to maintain the rates that were in effect and simply converted them over to a monthly rate.

By Mr. Devaney:

Q. Did you find it necessary to make any other deviation in the payment of these employees, other than paying them on a monthly basis? A. Well, of course there were some people who returned to work who had been former employees. They came to work after the strike began and they requested that they also be paid on a monthly basis, expressing the opinion that it would give them some basis for returning to work; in other words, the job that they would come on would be a monthly or salaried job, as compared to the hourly-rated job that they had left. So in those cases where they indicated a preference, we went along with them also.

Q. Did you find it necessary to make any special payments to these people at this point that you had not
219 regularly made before the strike occurred? A.

Yes, because of the extreme shortage of men, it was necessary in many cases to send them to points that were entirely unrelated to their homes, and in those cases, the

men requested some allowance for expenses and we entered into understandings with those people to provide them with expense money away from home. Of course, that's not entirely unrelated to normal conditions on the railroad before the strike where you might have a wreck and you send a crew out in emergencies to repair the track, and they would be paid expenses while away from home.

Q. Were there also instances before the strike, Mr. Wyckoff, in which the railroad furnished living quarters for employees? A. Yes, there were camp cars for the maintenance-of-way extra gangs. And there also was a wreck car or wreck cars that went along with the wreck train.

Q. Now, do you still pay this living expense allowance? A. No, we have been able to recruit sufficient personnel that we have been able to move the men closer to their homes and, in that manner, alleviate the necessity for such allowance.

Q. When did you begin the elimination of this
220 living cost or living allowance? A. Well, we tried to move the men closer as replacements became available for him at the point he was working. And I would say, oh, by August we had eliminated quite a bit of it.

Q. Did some still remain at the time the written "Conditions of Employment" were first distributed, on September 1st? A. Yes, there were a few cases that were still remaining.

Q. Was there any provision in the written "Conditions of Employment" for this? A. No, sir.

Q. But you did continue this after the so-called written "Conditions of Employment" were distributed? A. Wherever it was necessary, yes.

Q. Now, did you—did I understand earlier that you said that you began a movement from the salary back to the hourly rate of pay? When did this—when did you begin moving back toward the hourly rate of pay after February 3rd? A. Oh, I would say some time around April, as we started getting more people making applications.

Q. Now—

221 The Court: You are speaking of April, '63, now?

The Witness: That's correct, yes, sir.

By Mr. Devaney:

Q. Now, what relationship did the hourly rates bear to the rates that had existed in the agreements before the strike? A. Well, the rates that were set forth in the "Conditions of Employment" bore a close relationship to the rates that were in effect prior to the time of the strike. However, in many cases, there were varying rates for a specific type of job. For example, a stenographer in Miami in the freight office might get \$20.00 a day, one at the yard office at Hialeah, just a few miles distant, \$21.00 a day, one at West Palm Beach, \$18.00 a day. So we took all of the various rates in that classification and averaged them, or consolidated them and took one average rate for that classification.

Then, in addition, we included—

Q. Might I ask you right at that point what was the reason for that, Mr. Wyckoff? A. To simplify the accounting procedures. There again, were were short manpower and we had to do everything possible to simplify those procedures.

222 Q. All right. Now, continue. Were there others?

A. In addition, we included in the basic rate an equivalent of the amount that the employees would receive for the seven paid holidays; in other words, holiday pay as as such and, if they worked on the holiday, they get time and a half for working.

Q. Were any of the hourly rates, Mr. Wyckoff, discounting this allowance for the paid holidays and discounting for the moment this consolidation of such identical positions as that of a secretary where you use an average rate, were any of the other rates less than had been paid under the agreements that were in existence before the strike? A. I think possibly in one or two instances, there might be a reduction in rate, yes.

Q. Except for those, were the rates less than those in existence before the strike? A. No, they were not.

Q. Now, what were the one or two exceptions, if you recall, where the rates may have been less? A. Well, as I recall, the Supervisors in the Mechanical Department, the rates were reduced on those positions principally because the people that we got in certainly did not have the degree of experience to supervise in the manner that the employees who had left the service had supervised;
223 so the rates were adjusted in conformity.

Q. Now, do I understand that the salaries that you paid to employees bore the same relationship, except converted to a salary rather than an hourly basis; that your hourly rate bore to the rates that were in existence before the contract? A. That's correct.

Q. In other words, you attempted, as far as the rates were concerned, to maintain and not to change the rates of pay that had been paid before the strike began and after you began the service on February 3rd? A. That's correct.

Q. Now, these seniority districts: Does this mean a physical separation of some distance, Mr. Wyckoff? A. No, it's usually only a separation on paper. Two seniority districts could be involved in the same office.

Q. You mean in the same room? A. Same room. Two people could be sitting side-by-side, one working in a line of road seniority district, the other in a general office seniority district. They might do identical work but you couldn't give the employee on the line of road seniority district the general office work to perform or vice versa.

Q. Did this apply to the distinctions between the
224 various craft lines? A. That's also correct. You could have, oh, an electrician, for example, who is qualified to do welding. You may have one or two hours welding work to be performed, but you couldn't use that electrician to perform the work. You couldn't cross craft lines. You had to have a separate man on duty to perform that couple hours of work.

Q. Now, what occurred, Mr. Wyckoff, when the strike occurred? Did you have any of these employees left to perform service? A. No, all the employees working under the scope of the agreement were called out on strike by the organizations.

Q. Now, when you began operations how did you have to operate in order to perform the service? A. We had to use only supervisory personnel to perform work.

Q. Did supervisory personnel have to perform the book-keeping or the welding or the shop work and track work? A. They performed all the work that was to be performed.

Q. Was it possible to observe with supervisory personnel the craft lines and the seniority districts that had been called for under the agreements that the unions had before they walked out on strike? A. No, it certainly
225 was not.

Q. Now, when you began hiring employees was it possible with the staff that you had to observe these craft lines and the seniority districts? A. No. There again, it was necessary to utilize each man to his fullest extent.

Q. Was this the—was this the primary distinction between your operation during the period of the strike and your operation before the strike occurred? A. That and in some instances, we had to contract out work which was not permissible under the agreements.

Q. You have—Are you still contracting out some work? A. Yes, we still have some contractors performing services.

Q. Are these contracts terminable at will? A. I'm not familiar with the terms of the contracts. Now some, I believe, have a 30-day cancellation clause; others, when the project is completed then, of course, the contract ends.

Q. Now, during any period of operations, Mr. Wyckoff, prior to this strike, were there occasions when the union or unions filed grievances claiming that you had violated the contracts? A. Well, after the strike began and I
226 issued—

Q. No. I'm saying before the strike. Let's forget this for a minute.

Before the strike, were there occasions when unions filed grievances claiming that you had violated the contract? A. Oh yes, many, many of them.

Q. Could the unions, Mr. Wyckoff, have filed grievances after the strike began? For violations of its contracts? A. Yes, sir—

Mr. Rutledge: Objection, Your Honor. This is the same question we objected to before.

The Court: Objection sustained.

Mr. Devaney: I have no further questions at this time, Your Honor, on cross.

The Court: Can the witness come down?

Mr. Milledge: I just want to ask one question, Your Honor.

The Court: All right.

227 Redirect Examination

By Mr. Milledge:

Q. You have appeared before the Defense Board, in October, the one that met over here at Cape Canaveral, or it may have been right here, but the Defense Board that the Secretary of Labor, and so forth, attended? A. I didn't testify before that Board, no.

Q. Mr. Thornton testified before the Board? A. Yes, he did.

Q. Did he not represent to that Board at that time that the railroad had restored 95% service in October? A. I'm not familiar at this time, or I can't recall at this time, just what the testimony was without reviewing it.

Q. You had resumed 95% of freight service by last October, had you not? A. There again, I'm not in position to answer. I can review—

Q. You have been answering—excuse me, go ahead. A. I can review the testimony and tell you the answer.

Q. You are in a position to testify today—

The Court: Are you asking him now what Mr. Thornton testified before the Defense Board or what the facts
228 were?

Mr. Milledge: No, what the facts were. He says he can't answer that, but he can answer it today. He says—

By Mr. Milledge:

Q. You say today you are doing 95% freight capacity?

A. That's correct.

Q. But you don't know what—

The Court: What was the situation in October? Or to put it another way, when did you attain 95% of capacity?

The Witness: Your Honor, I'm not in a position to answer that right at the moment. I would have to check back on the records. But we are handling 95% now of the volume we handled before the strike.

The Court: You testified before me in December that you were up to 95% then; isn't that right, the 7th or 11th, whenever it was?

The Witness: I don't think I testified to that.

The Court: Well, maybe you heard Mr. Thornton
229 or somebody else say it; that's correct, is it?

The Witness: To the best of my recollection.

By Mr. Milledge:

Q. So, in other words, for quite a long time now, you have quit recruiting people— A. No.

Q. —because you've had the same level for six or eight months? A. No, we haven't quit recruiting people. We've been recruiting right along.

Mr. Milledge: All right.

Mr. Shapiro: Your Honor, I have just, I think—

The Court: I was just going to read him an answer of Mr. Thornton before the Federal Inquiry Board under the Department of Labor, and so forth, the October hearing, this Board of Mr. Reynolds, Mr. Hillman and Mr. Shul-

man, on page 153 at the bottom of the page, the answer of Mr. Thornton:

“Our freight train operation is now up to 95.53% of the cars that we are handling this month 230 as compared to the number of cars we handled this time last month.”

I think he probably meant last year.

“So we are getting up now in the freight train mileage almost comparable to the freight train mileage we had last year. To go into this area of our operation, to give you some indication, to show you how this service has been restored on the F.E.C. since the beginning of the strike, I have calculated the figures here which show the total number of cars handled each month as compared with the corresponding month last year. These are figures showing cars handled by each train and totalled monthly.”

So actually you are more personnel and Mr. Thornton more operations, and he is more—

The Witness: That's right.

The Court: —familiar with this figure than you are, but you have no reason to doubt those figures that he gave at that time, do you?

231 The Witness: Not if they are reported there, no, sir.

Further Redirect Examination

By Mr. Shapiro:

Q. Mr. Wyckoff, after the strike on January 23, 1963, began, did you make an effort to recruit sufficient personnel to comply with the collective bargaining agreements?

A. We have been recruiting personnel and training them just as fast as we can since the strike began.

Q. That's not the answer to the question, sir.

Did you recruit personnel in an attempt to comply with the collective bargaining agreements? A. In an attempt

to comply with the collective bargaining agreements and to provide service to the public which they require.

Q. Did you attempt to recruit personnel for the purpose of complying with the collective bargaining agreements?

A. For both purposes.

Q. Now, the Court has read aloud the testimony of Mr. Thornton before the Federal Inquiry Board; the carrier had reached 95% of freight capacity by the time that the Federal Inquiry Board was held in October of 1963.

Mr. Devaney: Your Honor, may I again, I think
232 one point Mr. Shapiro has made is in error. He is talking about freight capacity and those figures are talking about numbers of cars handled. I don't know what the difference or where the difference lies, but there is a difference and I think that this probably needs to be cleared up.

The Court: Well, I think he used "capacity" loosely.

Mr. Shapiro: Yes, I did.

The Court: You are not talking about the capacity but, rather, a comparable tonnage and mileage one year as against the other, aren't you?

Mr. Shapiro: Yes, that was the intent. Actually, perhaps I should refine that term a little bit.

The Court: All right.

By Mr. Shapiro:

Q. To refine it then: The carrier was, according to the testimony we have just heard read into the record, the carrier was carrying 95%, moving 95% of the amount of freight that it had moved the previous year in October of 1963.

233 Now, how many employees did you have at that time, do you recall, in October of 1963? A. Mr. Shapiro, I'm not in a position to answer that. I would have to check my records to find that out.

Q. You can't recall? A. (No response)

Q. Mr. Wyckoff, if you will bear with me just one mo-

ment, I'm going to try to locate something which may refresh your recollection.

Before the Federal Board of Inquiry, Mr. Thornton concluded his—Mr. Thornton testified as follows:

“The next portion I would like to cover is the portion I referred to a moment ago, our manpower requirements.”

Now, let me interrupt there in my reading and ask you: Is Mr. Thornton the officer responsible for the personnel requirements on the railroad? A. Mr. Thornton at that time was Vice President and Chief Operating Officer, and he was responsible for operations.

Q. Did you furnish him information on manpower—for manpower staffing requirements? A. I furnished him with manpower and have been responsible for employing and having manpower trained.

Q. And in the course of carrying out your responsibilities, then you are familiar with the manpower requirements of the railroad? A. That's correct.

Q. So that if Mr. Thornton was testifying about manpower requirements, he was obviously testifying on the basis of information that you furnished him; is that right? A. That's correct.

Q. “The next portion”—this is Mr. Thornton's testimony before the Federal Board of Inquiry:

“The next portion I would like to cover is the portion I referred to a moment ago, our manpower requirements. At the outset of this work stoppage, we utilized primarily our supervisory personnel. As it became obvious to us that this work stoppage was going to be of prolonged duration, we made necessary arrangements and plans and executed these plans for recruiting personnel to continue the operation and restore it to full service in all respects. To do this, we are very proud of the qualifications that we have established for these new personnel. We have
235 as of this time, in excess of 650 employees on the railroad whom we have recruited or who have ac-

tually returned to work since the work stoppage. Now, these employees are being very closely screened. We are screening them from the aspect of their personal references. We are screening them through our special services department as to any criminal record they may have, screening them as to any educational requirements. We are now employing only people with high school educations with lessons in lab class, whereas before they had grammar school. We are screening them as far as physical requirements are concerned. We have instituted a very thorough physical examination and have included back Xrays. I make the comment that we have been selective in our requirements. Of the 650 we have now, I would give you this as a conclusion. I can't give it to you exactly but

I would imagine we have over 1,000 applicants we
 236 considered for employment and we have gone into a good long-range program from the standpoint of employment capabilities. After these people have been actually employed, they are trained. We do not utilize these people on the job until they have been trained. This training is still going on."

Now then, there is a further question—I'm skipping some of this testimony. Or I would be willing to call Mr. Thornton for the purpose of developing this further—

The Court: Yes.

Mr. Shapiro: —with him. I'm skipping part of the testimony now, which appears incidentally, the document that we have been reading from is "Hearing before the Joint Federal Inquiry Board under the Chairmanship of the Department of Labor with the Department of Defense and the National Aeronautics and Space Agency participating", and it is dated Tuesday, October 1, 1963, and I have been reading starting at page 139.

Now, skipping a portion of this testimony, we have
 237 a question from a member of the panel, Mr. Shulman:

“What did you consider a complete staff?”

Mr. Thornton: “Well, let me say this: Prior to the strike, we had approximately 2,000 employees. I do not anticipate that we would need anywhere near this amount because we’ve been able to eliminate to a very large degree the featherbedding that’s been in the railroad industry.” And there follows an example based on the requirements for trains.

By Mr. Shapiro:

Q. Now, does that refresh your recollection, Mr. Thornton, sufficiently for me to ask you whether you were making any attempt to recruit people for the purpose of complying with the collective bargaining agreements and to provide the service the public needs and demands?

Now, Mr. Wyckoff, you heard me read Mr. Thornton’s response to Mr. Shulman’s question, “What would you consider a complete staff?” Was there ever any intention of attempting to acquire again a complete staff so that you could operate with replacements? A. As I said
238 before, we have continued to recruit personnel and train them. Now—

Q. Would you please answer the question, sir? A. I was trying to.

We haven’t reached a point where we have our positions all filled. We are continuing to recruit personnel.

Q. I asked what—did you have the intention of recruiting a sufficient number of replacements to bring your strength up to the requirements of the collective bargaining agreement? A. Yes. And of course, those requirements changed on October 30th.

Q. Your answer; this, of course, was as of the October requirement, Mr. Wyckoff? A. That’s right.

Q. And now you state, your answer to my question is yes, you did intend to recruit up to the level required under the collective bargaining agreement? A. That’s correct.

Q. Then you disagree with Mr. Thornton’s statement

that "I do not anticipate that we would need anywhere near this amount", meaning 2,000 employees, "mainly because we've been able to eliminate to a very large degree the featherbedding that's been in the railroad industry." A. We had already served the notice of September 24 by that time and we were optimistic that we would be able to negotiate an agreement on that and eliminate the featherbedding.

Q. Now, your temporary "Conditions of Employment" are, with the exception of the items you have previously enumerated in your testimony, substantially the same as the notice of September 24, 1963?

The Court: I'm sure you went over this.

Mr. Shapiro: Yes, Your Honor.

The Court: On your earlier examination. So did Mr. Milledge.

By Mr. Shapiro:

Q. You testified, sir, that if you were required to comply with the collective bargaining agreements, you would be compelled to reduce the service approximately 50%? A. That's correct.

Q. How do you reach this figure, sir? A. Well, we have, as I told Mr. Devaney, in the neighborhood of 400 non-operating scope employees working today. Prior to this strike in those classes, not including passenger or LCL freight, in round figures there were a thousand; so that means we would need 600 additional people to comply with the requirements of the various agreements that were in effect prior to October 30.

Now, that's just about 50%.

Q. Now, as of October 1, 1963, Mr. Thornton testified that you established a long-range personnel program of which you were quite proud. Was this long-range personnel program which had been established conceived of for the purpose of complying with the collective bargaining

agreements? A. Yes, it was conceived of to provide the railway with manpower with which to operate and to operate under the agreements that were in effect.

Q. But you had changed your physical requirements, according to Mr. Thornton's testimony, had you not? A. As I said, we had served notice on September 24 of a desire to revise the agreements and we were optimistic that the notice would be consummated and the agreements would be consummated thereon in the not-very-distant future.

Q. But you had already gone into a good long-range program from the standpoint of employment capabilities on October 1, 1963, six days after your notice was served; had you not? A. We started in a long-range program of hiring and training personnel in February of '63.

Q. So that your long-range program in February of '63, eight months before your notice of October—September 25, 1963, nine months before it, was really not directed at these collective bargaining agreements. It was directed at changing the collective bargaining agreements; is that right? A. Mr. Shapiro, the personnel we hired, we anticipated working under whatever collective bargaining agreements were in effect. Now, until such time as we had sufficient personnel to comply with the agreements, provisions that were in effect, we had to deviate from them.

Q. Now, you changed your educational requirements from what had existed previously; did you not? A. That's correct. I think that's a prerogative of management and has been—

The Court: Would you mind answering the question.

By Mr. Shapiro:

Q. Your long-range program stated:

“We are now employing only people with high school education.”

I'm sorry—Mr. Thornton's testimony was:

242 "We are now employing only people with high school education with lessons in lab Class, whereas before they had grammar school."

Was this a consequence of the emergency that you raised your educational requirements for hiring? A. Well, obviously we wanted only first class employees working.

Q. You could have—you had no difficulty in obtaining applicants, I take it? A. That's correct.

Q. You testified earlier that there was a time when there had been a smaller number of applicants. I may be putting words into your mouth; let me review this.

You testified that at one time you had difficulty recruiting personnel? A. In the early days of the strike, that's correct.

Q. Mr. Thornton's statement is that:

"We have over a thousand applicants we considered for employment."

This was at a time, according to the testimony, when you had 650 employees on the railroad.

I take it then that you really didn't have any difficulty at this time, in October of 1963, when Mr. Thornton testified, in obtaining applicants? A. We have many
243 applicants but they didn't all meet our qualifications.

Q. But your qualifications aren't based on the collective bargaining—weren't based on the collective bargaining agreements, were they? A. I don't know of any requirement in the collective bargaining agreements with respect to qualifications for applicants.

Q. What you are telling me then is that you don't need to hire sufficient replacements to meet the collective bargaining agreements because you can always raise your standards to a point where you can't find sufficient replacements to meet them; is that it? A. I didn't tell you that at all.

Certainly a requirement for a high school education for other than common labor is not excessive.

Q. Now, Mr. Wyckoff, have your personnel levels reached the permanent point under which you wished to operate at the present time? A. No. We are still recruiting and training today. I said that before.

Q. Are you recruiting and training for the purpose of increasing your work force or for the purpose of replacing turn-over? A. Increasing our work force.

244 Q. What is the approximate size of your work force today? A. We have approximately 850 employees.

Q. So that you have picked up 200 employees since October, when Mr. Thornton testified you had approximately 650? A. Well, that's right.

Q. Now, that's almost an increase—well, it's an increase of slightly less than a third again of your October work force, I believe, from 650 to 850, an increase of a third—in how many months? Eight months? A. Approximately.

Q. So that in the eighteen months of the strike, you've been able to recruit and train a work force of 850 employees; is that right? A. Well, Mr. Shapiro, it's not a static force. In other words, you constantly have replacements in addition to endeavoring to increase the force.

Q. Now, you are levelling off your work force, I take it? You were from February of 1963 to October of 1963, you had a force—you raised your force to 650. From October 1, 1963 to this month, you've increased it by 200, so that

your rate of increase has slowed down; is that right, 245 sir? A. Well, of course, the more employees you have, the more turn-over you have; in other words, the more replacements you have to hire to maintain the equivalent and the additional for increasing the force.

Q. But your statement that it would take eight—you testified that it would take approximately eighteen months from now to acquire and train sufficient personnel to operate under the former collective bargaining agreements.

It seems to be quite at variance with the fact that, in

nine months. you have been able to recruit a force of 650, which brings you to 95% of your previous freight.

I ask you whether, with this force of 650, you couldn't embark on a training program, if you so desired, to recruit, to train under the existing—under the former collective bargaining agreements a force sufficient to operate thereunder in accordance with the Act? A. I told you, Mr. Shapiro, we are recruiting and training every day. Now, we can't do more than that.

Q. You haven't answered the question. A. Yes, I have.

Q. I will try and repeat it, Mr. Wyckoff.

You have a force of 650—of 850 personnel at the present time who are operating 95% of your freight capacity, 246 and you are telling me that it would take you eighteen months to build—to train, to replace and train for the positions paid and maintained under the collective bargaining agreements as they stood prior to the September 24, 1963 implementations.

Now, I ask you, in light of what you have answered, whether that estimate is accurate? A. It might be very conservative. It might take longer than that. I gave an estimate to the best of my ability at this time. I estimate eighteen months; now, it may well take longer than that.

Q. If you raise your standards for hiring employees, can you stretch—does it make it more difficult to meet the requirements of the collective bargaining agreements?

A. I don't quite follow you.

Certainly you don't expect the railroad to hire bums, people with police records or criminal records, and so forth, just for the sake of putting individuals on the payroll?

Q. I don't believe that was my question and I would appreciate it if you would not question me.

All right, prior to the time of the strike, according to Mr. Thornton's testimony, most of your employees had grammar school education. Let me refresh you on

247 it, if I may:

"We are now employing only people with high school education with lessons in lab class, whereas before they had grammar school."

Now, you were able to run a railroad with the people you had with the grammar school educations; were you not? A. Perhaps not as efficiently as it's being operated today.

Q. So that your interest here is in increasing your efficiency; is it not? A. Why certainly it is.

Q. And you prefer to operate under these "Conditions of Employment" rather than under the former agreements, which I think—well, is that correct? A. Mr. Shapiro, I don't know how to answer your question other than this:

We have ample applicants with high school education and that can meet our physical requirements to train just as quickly as we can train them.

Now, does that answer your question?

Q. The question is: Given a choice between the—the question was addressed to the railroad's preference.
248 You are interested in efficiency, which is very laudable.

Mr. Devaney: Your Honor, I object to this line of questioning. I think we've been patient. The fact that the railroad gave notice of its desire to put certain rules changes into effect, I think indicates that given its complete preference, of course it felt that these were superior to the rules that existed prior thereto.

I think this questioning—what the railroad preferred and what it wanted to do—I think we've really drug this through this proceeding long enough. I don't see that we're getting anywhere.

Mr. Shapiro: I think that Mr. Devaney's comment that, of course this is a matter of the railroad's preference, establishes the point which we considere relevant and that is that these changes which have been put into effect are not really a product of the emergency but are a product of the railroad's desire, which may be perfectly legitimate,

to rid itself of the provisions of the collective bargaining agreements which it feels are hampering its operations.

249 Now, those are the real objectives of these changes that have been put into effect. And our disagreement with this is not that they are to increase efficiency but that they have been done in violation of the Railway Labor Act's requirements.

Since Mr. Devaney has made my point, I think we needn't pursue the line further.

By Mr. Shapiro:

Q. One further question, Mr. Wyckoff, and I think we will at last be done.

In your experience as the Personnel Director of the Florida East Coast Railroad, have you ever seen a grievance procedure filed complaining that the carrier had put into operation a written revision of the terms, or any of its terms, on any of the collective bargaining agreements which are in force? A. I don't know about a written revision. I know there have been many grievances processed on the contention that the carrier has changed the method of application of agreement rules.

Mr. Shapiro: Thank you, Mr. Wyckoff.

I have nothing further, Your Honor.

250 Mr. Rutledge: We have nothing further, Your Honor.

Mr. Devaney: Nothing further, Your Honor.

The Court: Come down, Mr. Wyckoff.

The Witness: Thank you.

(Witness excused)

The Court: I would like to take a recess at this time, Gentlemen, until 9:30 tomorrow morning. I was hoping it could be finished today but I was a little optimistic.

Mr. Rutledge: Your Honor, may I bring one thing to your attention. One of the witnesses who was subpoenaed,

he was subpoenaed in the Court of Appeals, Mr. Van Arsdall of the Brotherhood of Railroad Trainmen, yesterday afternoon and he has received word that his wife is seriously ill in Miami.

The Court: He was subpoenaed in the Court of Appeals?

251 Mr. Rutledge: He was asked to come out of the Court of Appeals and served with a subpoena at that time.

The Court: Oh, I see. He was served at that time.

Mr. Rutledge: Yes.

The Court: And what now?

Mr. Rutledge: He has received word that his wife is seriously ill in Miami and he would like permission of the Court to go to Miami.

The Court: What is the gentleman's name?

Mr. Rutledge: Mr. Van Arsdall.

The Court: Can you spare him?

Mr. Devaney: Your Honor, we would be more than delighted to release Mr. Van Arsdall. We would like, however—

The Court: Is there some other Trainmen's representative that can be here in his place?

252 Mr. Rutledge: There are other Trainmen representatives here, yes, Your Honor.

Mr. Devaney: The only thing really we would have any reservation about are the records in Mr. Van Arsdall's possession. If somebody else has those, we have no objection to releasing Mr. Van Arsdall.

Mr. Milledge: Judge, this Mr. Van Arsdall was served in Jacksonville yesterday. He's from Miami, naturally, where all his records are, and not a one of his records is up here. He was served yesterday afternoon with this great big subpoena duces tecum; so naturally, he doesn't have anything because it's all in Miami. And there has been no mileage paid to send anybody down there with a van to bring it back.

Mr. Devaney: I don't think we're talking about a van, no matter what Mr. Milledge may say. All we have asked for are the records; so that if Mr. Van Arsdall can't make this arrangement, I have no objection to releasing him subject to his being available or that the records be available at a reasonable time.

253 The Court: Well, he hasn't got the records. The man who will be here tomorrow, you've got a man who will be here tomorrow with as much as he's got?

Mr. Milledge: Yes, sir.

The Court: As I understand, he was served after he came up here yesterday afternoon.

Mr. Milledge: Yes, sir. And we'll have another officer—

The Court: You will have another officer, as well off as he is. With that agreement, may the gentleman go to his sick wife?

Mr. Devaney: Certainly. We don't want to prevent that. All we want are the records.

The Court: In other words, I'm not exacting a stipulation that these records be here in the custody of some other man by reason of this request. You will have a man here that will have just as much as he would have.

254 All right. Thank you, Gentlemen.

(Thereupon, at 5:05 o'clock p.m., on Tuesday, May 26, 1964, the Court adjourned to be reconvened at 9:30 o'clock a.m., on Wednesday, May 27, 1964.)

255 Thereupon, at 9:30 o'clock a.m., on Wednesday, May 27, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had:

The Court: Good morning, Gentlemen.

Mr. Milledge: Good morning, Judge.

Mr. Devaney: Your Honor, we would like to file at this time a Motion to Compel Answer, which is filed pursuant

to Rule 37(a), and this is in connection with the deposition of Mr. Eugene C. Thompson.

Secondly, it is a Motion for Production of Documents.

We can file these now, or would you rather we wait until the Government completes its case? We will act at the pleasure of the Court.

The Court: Let me see them.

(Clerk handing instruments to the Court)

The Court: I am inclined to think that it might be better to hold these until conclusion of the Government's case. He received copies of them. It looks like
256 it may take some time, some planning, and I think maybe we better go ahead at this moment.

Mr. Devaney: Very well.

The Court: You may proceed, Mr. Shapiro.

Mr. Shapiro: We would like to have Mr. Winfred Thornton called.

Winfred L. Thornton

having been produced and first duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

Mr. Shapiro: Your Honor, the examination of Mr. Thornton will be conducted by Mr. Edelman.

By Mr. Edelman:

Q. For the record, sir, would you state your full name.

A. Winfred L. Thornton.

Q. Are you an officer of the Florida East Coast Railway Company? A. I am.

Q. What position do you hold? A. I hold President.

257 Q. And what are your duties in that position?

A. Well, as general supervision of the operation of the railroad.

Q. When did you become President of the carrier? A. On the 14th of this month.

Q. And prior to that, what was your position? A. Vice President and Chief Operating Officer.

Q. How long did you hold that position? A. For approximately three years.

Q. And in that position, what were your duties? A. Well, more specifically in the transportation and maintenance and the operation of the railroad.

Q. So that you are familiar, are you not, with the operations of the Florida East Coast Railway since January, 1963, and in fact for some time prior to that? A. I am.

Q. At the present time, if you can tell me, what is the average daily freight income of the carrier? A. Well, I haven't got those figures with me.

Q. Can you tell me approximately? A. No, I really couldn't give you any estimate. It varies from day to day, depending on the day of the week; so I couldn't give you any figure on that.

Q. I show you—

258 The Court: You mean revenue, don't you?

Mr. Edelman: Yes, referring to revenue, Your Honor.

By Mr. Edelman:

Q. I show you a document entitled "Affidavit of Winfred L. Thornton". Can you tell me what that is? A. This is an affidavit that I prepared. It doesn't reproduce too well. Apparently in March, '64.

Q. And does that affidavit indicate anything concerning the daily revenue of the—I direct you to the second page and to— A. Paragraph 5 reads as follows:

"The railroad will suffer irreparable damage if required to reduce its services. It is estimated for the months of January and February, the railroad had an average daily freight income of \$63,430. The traffic is reduced 43%. The

revenue will likewise be proportionately reduced. This will result in a daily loss of \$27,259."

Q. That's a revenue figure; that's your receipts for the day, is it not? A. That was for the period mentioned there.

259 Q. Yes, but that's not a profit figure, is it? A. No. That was the income figure.

Q. Could you offer me any estimate at all, if the revenues were in the area of 60 to 65 thousand dollars, what the daily profits were?

Mr. Devaney: Your Honor, I object. I think this is totally immaterial to any inquiry here. If we are talking about reduction of business, that's one thing. We are not concerned here with the profit and I see—

The Court: Would you suggest what relevance this has?

Mr. Edelman: Your Honor, in talking about the injury to the carrier in having to reduce its service should the Court issue any order, it would seem to me that the relevant inquiry is not the reduction in volume, or at least not entirely the reduction in volume, but also what the financial impact on the carrier would be, which would be a profit impact.

The Court: Of course, first of all, Mr. Thornton is an operating officer and not an accounting officer. If it's
260 really material to get figures of this kind, they are filed monthly with the Interstate Commerce Commission, I believe, and they are available and can be put in with exactitude, or an accounting officer from the F.E.C. could be called here.

In the second place, the harm that may result from substantial reduction of this carrier's ability to operate—to offer service, that harm is by no means limited to the impact revenue-wise on the carrier. The public interest is—

Mr. Edelman: Oh, yes.

The Court: There are a great many other features of it.

Mr. Edelman: Yes, sir, I appreciate that.

The Court: In other words, if they were required to cut their service in half by reason of going back to these old agreements, there would be many other harmful effects other than the loss of revenue to the—and the loss of income to the carrier. There are many other effects involved.

Mr. Edelman: I was only directing myself to that
261 one aspect of the changes which would occur if the carrier cut back its operation. However, we have distinguished that Mr. Thornton's affidavit did refer to receipts and not to profits, which was the main thing I was getting at.

The Court: Yes, sir.

By Mr. Edelman:

Q. At what percentage of capacity approximately, Mr. Thornton—this is an operation-kind of figure—would you say that you are now operating. Let me make that more specifically:

In terms of what the road carried for a comparable part-time of the year during a non-strike situation, what percentage are you now operating? A. Well, in comparing the actual carloads of freight that we handled, we are some weeks handling actually more than we handled in the corresponding period.

The Court: You have to go back to May and April and March of '62?

The Witness: Yes, sir. This—

262 The Court: In order to get pre-strike.

The Witness: Right. For example, I can't give you the last week's figure but, week before last, we handled more in that week than we did in the corresponding week in 1962, 1961 and 1960; so it varies, however, from week to week depending on the normal fluctuation of business. But substantially, we can say that we are handling freightwise all the traffic that's presented to us.

The Court: Everything except the less-than-carload lots?

The Witness: Yes, sir.

The Court: And that is not handled?

The Witness: That's not handled; only carload freight.

By Mr. Edelman:

Q. So that if you had more traffic in terms of—speaking generally about what's foreseeable—you could handle that at the present time, too? A. We can handle some additional traffic, yes, sir. We are soliciting all the traffic that we can handle.

263 Q. At the present time, given your present manpower situation and your present state of equipment and so on, if you were forced to abrogate some of the recent changes you've made in your rates of pay, rules and working conditions, talking about the putting in of the November 2nd, '59 notice and the September 24 "Uniform Working Agreement" which you have in effect, according to the testimony in this Court, how much of a cut would you estimate would occur immediately in the traffic that you are capable of handling?

Mr. Devaney: Your Honor, I object to the form of the question. He has said that if we are forced to abrogate certain rules; I think that we ought to know, for clarity, what specifically he is talking about.

In other words, is he asking this in terms of operations under all or only some of the agreements as they existed before the strike began on January 23, 1963?

I don't follow his question.

Mr. Edelman: I'll rephrase my question, Your Honor.

By Mr. Edelman:

Q. Mr. Thornton, if as a result of the order of this
264 Court or, speaking hypothetically, at the present time you were to operate as to the operating crafts under the original underlying collective bargaining agreements,

apart from the November 2nd, 1959 notice, and if as to the non-operating organizations you were to operate as to the collective bargaining agreements which existed prior to the time that you put in the September 24, 1963 "Uniform Working Agreement", what effect would that have on the—in your estimate, what effect would that have on your present capacity to handle traffic? A. Of course this is strictly a hypothetical answer in regard to your question, but I would estimate that it would probably reduce the traffic that we would be able to handle by approximately 50%.

Q. In the excerpt from your affidavit of March 9, I believe it was, 1964, which you read a few moments ago, a figure of 43% was mentioned. Is there any reason for your higher estimate at the present time? A. Well, actually we've hired some additional people since that time. Our traffic has increased since that time. And I was just gauging this from—for example, we have approximately 400 non-operating employees at the present compared to over a thousand before the strike began. This is 265 roughly 40-60. In other words, it would be a 60% reduction in personnel. And I just, again using a hypothetical answer, rounded it out to approximately 50%.

Q. I see. Would you make a different estimate if the change—let me put this a little more specifically:

If you continue to operate as to the operating crafts or classes as you presently are, that is, under the rates of pay, rules and working conditions that you presently have in effect, but had to make a change in the non-operating conditions affecting the non-operating crafts so that you had to go back to the agreements in effect before you put in the September 24, 1963 agreement, what effect would that have on the present traffic? A. Well, it would ultimately have the same result. Immediately it would affect the safety of the operation. In other words, if you would—it would mean that we could not provide the maintenance of the track; we could not provide the maintenance of the

engines and the cars that is necessary, and it would ultimately result in forcing us to move to reduce our traffic to the amount that we are able to maintain.

Certain revisions are required, for example, in the maintenance of a locomotive, quarterly inspections, monthly inspections, semi-annual and annually. If these maintenance inspections cannot be performed as a
266 result of not having sufficient personnel to make them, then we are not going to have the locomotives to operate the trains. So it will have the ultimate same result.

Q. Well, you say "ultimately". You really mean immediately. I take it you would take steps ultimately to change your manpower situation, would you not? A. Well again, that takes some time to acquire additional personnel and train them, and so your results would be the same. This would force a reduction in the service that we can perform.

Q. Were you present in the Courtroom yesterday when Mr. Shapiro read excerpts of your testimony before a Joint Federal Inquiry Board to Mr. Wyckoff, who was then on the stand? A. I was.

Q. Did you hear Mr. Shapiro make reference to your testimony about the existence of a "long-rang program" for the hiring of manpower at that time? A. Yes.

Q. How long have you had that long-range personnel program? A. Well, our long-range program started the moment we started to operate. In other words, our purpose was to try to restore service to the public and
267 we did so, to begin with, with our supervisory personnel. And our plans were to continue to give service to the public in spite of the fact that the unions were trying to deprive us of—by a strike, of doing so; so this was our plan, was trying to restore the service to the public.

Q. Now, did you make changes in certain practices as to the, say, the qualifications of the employees in estab-

lishing that long-range program? A. We set—there was nothing to change precisely. We set standards to have good employees. In other words, we wanted people with good educations, good moral standards, with good backgrounds, with good physical condition. And this is the standards that any company would establish in its employment.

Q. Were some of those standards different from the standards that you had been following previous to the existence of the strike? A. Well, possibly. We tried to get the best employees that we could and, in some instances, it indicated that what we had had before was lacking in many respects and, therefore, we wanted to improve the quality that we had.

Q. Could you give me some examples in which your previous— A. Well, as far as the education was
268 concerned, we wanted to be sure they were in good physical condition—

Q. Could you make this comparison for me, ways in which your previous practices were found lacking? A. Well, we found, for example, that many employees had—or after we had hired them in the past and they had worked for us for a number of years, had back trouble. And, investigating this, we found that these were conditions that possibly could have been determined by back Xrays.

For another example, we found people that we had employed, by not giving a very thorough examination, had possibly had a police record in other States. This, we wanted to eliminate.

So we went into all of this background to try to get the right kind of individual working for us.

Q. And didn't you in fact make your physical examination much more rigorous than it had been previously? A. Well, we tried to get physically qualified people. Now, that was the extent of the examination. We certainly wanted to get physically qualified people.

Q. Wasn't it also part of your long-range program to eliminate featherbedding? A. Well, we certainly want to in any operation on any company or any railroad, we want to have an efficient operation. This is a constant desire of any management.

269 Q. Did you change certain rules and working conditions from what they had previously been in resuming operations once the strike had occurred, with this in mind? A. We didn't change any rules or working conditions immediately. We didn't comply with the agreements that were in effect. We were—we could not comply because the unions walked off the job and we didn't have the people to do the work.

Q. Well, Mr. Wyckoff has told us that.

What I'm asking you though, Mr. Thornton, is whether, in reestablishing positions and formulating this long-range program beginning after the strike started, you didn't have in mind to undertake this reestablishment on the most efficient basis possible? A. Yes, sir, we did.

Q. And whether that non-compliance with the underlying agreements that you spoke of a moment ago wasn't directed at changing them so that—changing the terms for the— A. Well, I don't think you can—

Q. —period of the strike, so that you could operate as efficiently as possible? A. I don't think you can attribute that intent to what—I mean if that's what you say,
270 no; our intent was to operate the railroad efficiently. Now, that's the answer.

Q. Mr. Thornton, didn't you testify before the Joint Federal Inquiry Board on October 1st? I'm looking at page 141 of the transcript, if Mr. Devaney wants to look at this I'll show it to him.

Didn't you say this:

"Prior to the strike, we had approximately 2,000 employees. I do not anticipate that we would need anywhere near this amount mainly because we have been able to

eliminate to a very large degree the featherbedding that has been in the railroad industry.”?

A. I did.

Q. So that this was at least one of the effects, an effect, of which you were proud of your long-range program?

A. Well, very naturally we were intent upon operating the railroad efficiently, and heretofore there was a great deal of inefficiency in featherbedding, and make work rules in the railroad industry. And as a result of not having the manpower available, as a result of the employees not working, walking off the job, then it was forced upon us.

You know, invention is the mother of—whatever
271 that saying is.

The Court: Necessity is the mother of invention.

The Witness: That's it; necessity is the mother of invention.

The Court: There is also a saying that necessity knows no law, too.

The Witness: I don't recall that one, Your Honor.

By Mr. Edelman:

Q. All right, Mr. Thornton. A. This is what we found ourselves in, being forced to operate with the manpower that was available to us; and we found as a result of this that, much to our own surprise in many instances, the extent of featherbedding that existed.

Q. Now, using your long-range program, at what point would you say you finally achieved what you considered a satisfactory manpower level to carry as much traffic as would be presented to the carrier? A. Well, we are still employing and still training so we haven't—

Q. No, you're not answering my question.

At what point in time did you—I understand that
272 a carrier must constantly be employing new people and training them, but at what point in time did you substantially achieve ability to carry the traffic that would be presented to the carrier? A. Well, we have been

achieving this right along. Of course, your volume of traffic varies. At that time, October, when that was—I was testifying before the Board of Inquiry, this was at a time when the traffic level was considerably different than it is now. The traffic offered to us is substantially different and we have been able to handle—I think I testified—95% then and we are handling approximately 95 or possibly a hundred percent of what we are handling now, but we might be handling a hundred percent more than we handled at that time. So we are talking about two different things.

Q. Let's be careful about this:

How do things vary seasonably in the railroad industry?

A. Well, we have the perishable season.

The Court: This railroad, more than most others, is a seasonal railroad?

The Witness: Yes, this is correct.

273 The Court: It is a winter-time, the heavy traffic is in the winter time because of the fruit and vegetables.

Mr. Edelman: Yes.

By Mr. Edelman:

Q. What would that period be, Mr. Thornton? A. Well, principally your perishable season begins in late October and it builds up to the peak along about January, about the time the strike started in this instance, and it holds a pretty good level through until May, and then you hit another high peak in May and then it drops off for the Summer months down to a valley during August, September—July, August and September.

Q. However, you did testify before the Joint Inquiry Board, did you not, and I'm reading from page 155 of that transcript that—this is a question that Mr. Shulman asked: He said,

“What I'm leading to is are you confident of your ability to continue a percentage of 95% as you now start to build up to this heavy traffic?”

And at that time, you said:

274 "Yes, sir, we are and I think there is no question about our handling 100% of the traffic if it was presented."

So you certainly felt yourself capable at that time of doing what in fact you did? A. That's right.

Q. Now, didn't you also testify, Mr. Thornton, although I realize we are talking in the Summertime about a light season, this is page 154 of that transcript, that in August of 1963, I'll read the exact figure you said:

"In August, 90.08% of the traffic and for the first ten days of September, the figures we have available, we were up to 95.53% of the cars handled in the corresponding months of the previous year."

So that you had reached a 90% level by August, hadn't you, during the comparable term? A. That's correct. I might point out, however, in volume of traffic this was substantially less than what we are handling now.

Q. In your hiring over those months, were you able to hire people who had railroad experience? A. Some,
275 but it was in the very minutest minority. It was very few that—the vast majority of it, in fact almost entirely, it was new employees without any previous railroad experience.

Q. Of course you said to the Joint Inquiry Board, and I direct you to page 144 of that transcript. Mr. Shulman asked:

"Do any of these employees you have recruited, have they had previous railroad experience?"

You said:

"Yes, quite a few do. Some have not and we have instituted this training program."

Actually then, I take it, on that, on the basis of that answer, that probably it wasn't quite as hard to train

everybody as you have suggested? A. Well, it depends on what you want to train them for. If you want to train them to be a track laborer, this is not so difficult. If you want to train them to be an accountant or rate man, this is quite different. It just depends on what you're talking about.

The Court: Excuse me. Accountant and rate man?

The Witness: Yes, sir.

276 The Court: They are not union labor, are they?

The Witness: Yes, sir. We have people in—

The Court: In the clerks?

The Witness: In the clerks' organization.

The Court: I see.

The Witness: That do our accounting and also rates and also agencies that quote rate. This is—

By Mr. Edelman:

Q. Didn't you also testify before the Joint Inquiry Board, and I direct you to page 142 of that, you said, in concluding your remarks about your efforts in hiring, you said:

"I think we are approaching the point now where we are almost up to full manpower requirements."

Is that right? A. If that's what it says.

277 Q. Yes, I'm reading it accurately. A. All right.

Q. So you were approaching, as of October 1st, you were approaching the point where you were almost up to your full manpower requirements?

The Court: Excuse me. If there is any question of reading it to him accurately, I suggest you show it to him.

By Mr. Edelman:

Q. Yes, do you want to look at that? A. Well, I just say I assume that's correct. I don't question it.

The Court: Any time you want to see it, why, just ask him.

By Mr. Edelman:

Q. Yes, just ask me and I'll be glad to show it to you. That particular statement is right here. (Indicating) A. Right.

Q. Now, if, beginning in February of 1963 when you started to operate again, if you had been going to institute recruiting in order to operate under the old collective bargaining agreements, you would have had to hire a lot more people, wouldn't you? A. My purpose in operating was to operate the railroad to serve the public.

278 Q. Just answer my question.

If you were going to operate—if you had begun hiring at that time with a view to total compliance with the old collective bargaining agreements, you would have had to hire a lot more people, wouldn't you? A. Well, as we progress along. But our purpose was to operate the railroad.

Q. I understand that. A. Right. And this is what I had reference to in that statement.

Q. As time passed, you would have had to continue hiring more people? A. This is what we have done.

Q. How many people would you presently be employing if you had given the service you are providing, if you had hired over that eighteen months period with a view toward full compliance with the old collective bargaining agreements? A. I don't quite understand.

Q. How many people do you estimate would presently be in your employ if you had been hiring throughout the last seventeen months with a view toward achieving full compliance with the old collective bargaining agreement? A.

279 I don't think it would be substantially different from what we have right now. This is what we have been doing, is hiring people to perform the services. Of course, we are still way short of having the sufficient people to comply with those rules, if we were to have to comply with them; but the fact is we do not have these people.

Q. I don't understand.

You say it wouldn't be much different than it is right now. Why not? A. Because we've been hiring the people as fast as we can hire and train them.

Q. How many employees do you have right now? A. Oh, approximately 850.

Q. How many did you have last October 1st when you testified before the Joint Inquiry Board? A. Offhand, I can't recall exactly. It was referred to in there. Probably I gave that figure.

Q. Yes, you said 650. A. Well, that would be probably correct there.

Q. That's at page 140, in excess of 650 employees. A. And we's hired over 200 employees in the last, whatever that is.

Q. It's about nine months, isn't it? A. Right.

Q. And— But in the nine months previous to that, 280 going back to February, you were able to hire 650?

A. Well, 250 of those were supervisory people that we had at the outset, so—

Q. But still you hired twice as many during that first nine-months period as you have during the last nine-months period? A. That's right, because you get into the problem of training. You can't train—you reach a point where you have to train and get some experience with people you have before you can progress further. In other words, we couldn't have operated the first train without having some—

Q. Well, these people you've got working for you must be substantially trained or they wouldn't be running your railroad for you, would they? A. Well, it's still, if you hire any more, you have got to train those. And it's a progressive procedure. You can't haul in all these people at one time and train them.

Q. You mean, as you get more and more people, it gets harder and harder to train the people, so you've got to hire less and less? A. We have a turn-over, so you have this constant proposition of restoring those that have dropped

off for one reason or another. And in addition to the new people that you are increasing your force with. There has been a certain amount of turn-over. I can't give you
 281 the figure but this is happening for one reason or another.

Q. In absolute figures though, you would have to say that your rate of hiring has gone down over the last nine months? I mean, I grant you there must be some turn-over. A. Well, this is right for another reason, too. We have under the agreements that we are operating under, this '59 agreement which went into effect in February, we are complying with the agreement and it will not require that we hire as many people as we did previous to that time.

Q. Of course, that's just February and we are talking about much longer time period, aren't we? A. Well—

Q. We are talking about hiring over. A. Well—

Q. I suppose it's true— A. I don't know how the difference, the 200 we are talking about, when they were hired and in what crafts they were hired, and I couldn't give you that figure, but there are extenuating circumstances in all the situation.

Mr. Edelman: I have no more questions, Mr. Thornton.

282 Further Direct Examination

By Mr. Milledge:

Q. Mr. Thornton, during this past winter, your heavy season, you have been substantially able to meet, to carry all the traffic that has been presented to you? A. Yes, sir.

Q. Isn't that true? That actually started about October and it has kept on; right? A. This is true.

Q. And as you said before, this is a seasonal railroad? A. This is correct.

Q. And what is the normal difference between the Summer and the Winter in carloadings? A. Well, you have a difference as a result of your perishable traffic.

Q. Normally you carry a little more than twice as much

in the Winter as you do in the Summer, do you not? A. I don't know if that would be a real accurate statement. I have never actually said it in that respect.

Q. Well, you prepared a graph, though, that you submitted in the Trainmen case, so that's probably—

Mr. Devaney: May I suggest that if counsel wants
283 to refer to this, he show it to the witness so he will know what he is talking about.

By Mr. Milledge:

Q. All right. (Tendering instrument to the witness)

Now, in the year preceding the strike, and I'm referring you to your own graph, you show your Winter peak car-loading at what? That's 21,000 cars per week? A. Per month.

Q. 21,000 cars per month. And the low, the Summer low or the Summer average, is about what? A. Well, for the—I say it would average out ten and a half.

Q. All right, thank you.

And when does the Summer—let's see, I'll leave you the graph—it is a matter of fact that you have already started into the Summer period, have you not? A. Not quite yet. Our perishable season runs up into June.

Q. Yes, sir. All right, the graph shows that you start dropping off carloadings really about in April, usually? A. This depends on the season, I imagine. If you have a freeze, it affects your season. This year our peak was
284 within the last three or four weeks and it is going to run into June.

Q. All right. Now, in a normal Summer, you cut way down on your manpower, do you not? A. In certain categories. In your—in some of your operating crafts, it is necessary to; and other of your non-operating crafts, we probably increase the number that we have, depending upon the requirements of the service.

Q. Well, it seems to me that I had the idea that manpower had something to do with the amount of volume of

work you do? A. Well this, for example, with train service, if we run less trains, naturally we would have less operating men but we, as a rule, try to do quite a bit of our own maintenance on track, for example, during the Summer months when we have less traffic or interference with the maintenance procedures.

Q. But in any event, you are coming into the period now which you would normally, your service, your carloadings will be cut approximately in half? A. Well, that indicates that in that period.

Q. Right. A. I don't anticipate it will be quite that much this year because of the Cape situation, our traffic
285 into that area has increased tremendously and it is beginning to—on account of the Space Program, I anticipate that it's going to increase substantially. So I don't think it will necessarily follow that deep a depression during this Summer's months, but we will have certainly a depression compared with our Winter months.

Q. All right. And you are just coming into that period or you will very shortly? A. That's right.

Mr. Milledge: That's all I have.

The Court: Mr. Devaney?

Cross Examination

By Mr. Devaney:

Q. Mr. Thornton, are you still using supervisors to perform scope work? A. Yes, sir.

Q. Do you have any idea of how many of your supervisors are still required to perform scope work? A. Well, it's difficult to say. It depends on any particular day. If we run into a situation where we have to have them, then we can certainly call on them to do it, to give the
286 service. On another day, we might not require as many. But on occasions, I suppose we use a considerable percentage of them. Again, it just depends on the circumstances.

Q. Now, when the strike began on January 23rd, 1963, did you have any scope employees left to perform service?

A. No, we had—all of the scope people went out on strike or respected the picket lines of those who were on strike.

Q. If you had been able to operate only under the terms of the various agreements that had been in effect before the strike occurred and follow them to the letter, could you ever have performed service? A. No, sir, we could not have operated the first train.

Q. And why not? A. Well, we had no employees with which to comply with the agreement. It's against the agreement for a scope employee—I mean, for a supervisory employee to perform the service. Likewise, we could never have trained new employees to have performed the work because you've got to operate the trains and put the employees out there and give them some on-the-job training in order to qualify them for the work. Or if you even hired an experienced man, he couldn't go out and perform

the work unless you had him out on the road and let
287 him ride the train and learn the road. So we would never have been able to operate the first train if we had to comply with the agreements that were in effect.

Q. Now, the fact that you operated in this manner, do you contend that this changed those contracts? A. No, it didn't change them. Merely, we were not able to comply with them because we did not have the personnel. The organizations went on strike, effectively to deprive us of a work force. And our only alternative was if we were going to serve the public, which we have a legal obligation to do, was to operate the railroad with the men that we had available.

Q. Now, to give us some idea of the specific problem, Mr. Thornton, how many operating employees did you have available when you resumed service on February 3rd? A. Well, on February 3rd, approximately 8 to 10—about a dozen, we'll say.

Q. These were all supervisors? A. That's right.

Q. And what service did you begin, or what did you first do on February 3rd? A. Well, we operated one southbound train on the 3rd, and then on the 4th we brought back that crew and operated another southbound 288 train. So it was just one train in each direction.

Q. And how many people, operating people, were required to operate one train in each direction? A. We used four men on each one of these crews.

Q. And this—what positions would they have filled? A. Well, substantially they were the engineer, a conductor, and two trainmen.

Q. And you used the next—you used four more on the train in the other direction? A. Yes, sir, in the same capacities.

Q. Now, what would the agreements in effect before the strike have required by way of manpower to make the same trip from Jacksonville to Miami? A. Well, the work that this four-man crew performed, actually they had to pull the cars from the connections, which would involve a yard crew. They had to make their own train, which would have involved probably another yard crew. They had to put the engine on the train, which would have involved another crew. They would have had to operate the train from Jacksonville to Miami, which would have required three separate crews of five men each. And when they got into Miami, they broke up the train and placed the cars, put the engine away, which would have required probably two or three more crews at that location.

289 In addition, I can't recall exactly but I imagine they conducted their own brake test, inspecting the cars. This would have required mechanical men, car inspectors, to perform the service.

I'm sure they also performed the checking of the train, insofar as the cars, writing up the waybills. This was—so actually, those four men probably did the work of conceivably fifty or more men but, in doing so, we probably violated—I don't use the word "violated"—we probably

didn't comply with a very large percentage of the rules that were in effect prior to the strike. We could not have complied with these rules and have operated that first train or any train.

Q. Now, it has been suggested that, in questions directed to you, that you have operated and are now operating the railroad and carrying approximately the same amount of freight that you carried before the strike began, and that you are doing it with fewer employees.

Now, has this resulted in a net savings to the company?

A. Well, we have been able to increase our efficiency considerably and this, of course—able to—permit us for operating income to improve our situation. However, when
 290 you get down to the net, there hasn't been the improvement that we would like because of the sabotage and vandalism and the wrecking of the trains that has been going on. This, of course, has offset to a very large degree any efficiencies that we have been able to accomplish.

Q. What magnitude has the sabotage amounted to?

Mr. Milledge: Excuse me. I don't think this is at all relevant here.

Your Honor, we were talking about profit a little while ago and the Government wasn't permitted to go into profit. And Mr. Devaney is now back on the profit question, which I don't think—it has been ruled as irrelevant for the Government. I think it is irrelevant for the railroad also.

Mr. Devaney: Your Honor, I'm not interested in the question of profit but I am merely—

Mr. Milledge: You are interested in the question of sabotage.

Mr. Devaney: Mr. Milledge, I am interested in the question of the Government saying that we have set about to change all these rules because of its financial advantage. Now, if you think that we have operated for
 291 this reason—

Mr. Milledge: Are you speaking to me or to the Court?

Mr. Devaney: —and we have entertained this, you are mistaken and we have a right to show it. This is what it is for. We are not interested—we have not objected to going into the profit question, if it were material, but we do feel that we have a right to show—the Government has contended that we have derived great benefit. Now, we have not derived a great benefit and we have not in part because of the sabotage. I think we have a right to show what impact it has had on the railroad.

Mr. Milledge: Your Honor, we renew our objection.

The Court: I think it's irrelevant, to my mind. There isn't a remote connection with the issues here.

By Mr. Devaney:

Q. Now, Mr. Thornton, you were asked, or the statement was made by the Court, that you weren't carrying LCL. This is less-than-carload freight? A. This is correct.

292 Q. Was this handled to any substantial degree prior to the strike? A. No, this was—we handled very little of it. The majority of the LCL in recent years has gone to these car-loading companies. Now, we handle it in carload lots for these people but, as to specifically handling it ourselves, this has been on a very steady decline in the last ten years. And now, or immediately prior to the strike, we handled a very small amount of LCL freight.

The Court: If the truckers don't get it, why, its loaded in this piggyback service in carload lots and—

The Witness: Yes, sir. Or some freight forwarding companies.

The Court: Yes, sir.

Mr. Devaney: I have no further questions, Your Honor.

The Court: Anything further, Gentlemen?

Redirect Examination

By Mr. Edelman:

Q. Just one or two questions, Mr. Thornton.

293 I gathered from your earlier testimony that given—that this is really now one of the peak seasons for the railroad and that you are handling all the business that's coming your way, that you have really sort of probably levelled off in your manpower requirements, apart from turn-over problems.

Is that about what you said? A. Well, we still are employing some; but operating under the agreements that are presently in effect, we do not require a great deal many more but we will continue to hire and employ until we have met all of our requirements.

Q. You told—yet you told Mr. Devaney that you are still using supervisors for scope work? A. Well, I—that's correct.

Q. Is that part of your long-range program? A. As I indicated to you in my answer that we are still hiring people because we haven't got enough, and this is the reason.

Q. Yes, Mr. Thornton, you testified before the Joint Federal Inquiry Board in the following manner. You said:

“At the outset of this work stoppage, we utilized”—

This is at page 139—

294 “we utilized primarily our supervisory personnel. As it became obvious to us this work stoppage was going to be of prolonged duration, we made the necessary arrangements and plans and have executed these plans for the recruiting of personnel to continue the operation and restore it to full service in all respects.”

Then you went on, and I read you the statement before. You said:

“I think we are approaching the point now where we're almost up to full manpower requirements.”

This was nine months ago. My last statement is not a quote, of course. Is that right? So that then you were approaching full manpower requirements, and now you are still using supervisory personnel; am I right? A. We are using supervisory personnel because we don't have sufficient people to do it, and also, I don't mean to imply that when the labor organizations went on strike and deprived us of the work force that it was incumbent upon us to comply with all the respects—

Q. No. You are not answering my question, Mr. Thornton.

I'm saying that you told the Joint Federal Inquiry Board in October that you were approaching your full
295 manpower requirements, having at one time having to utilize almost all supervisory personnel and having tried to eliminate that situation by recruiting; and yet nine months later, you are still using supervisory personnel; is that or is that not true? A. That's correct.

Mr. Edelman: Thank you.

Mr. Shapiro: Your Honor, this concludes the Government's case in chief on this Motion for Preliminary Injunction.

(Witness excused)

The Court: Now, we have the question of the duces tecum subpoenas. We have this Rule 34 Motion served this morning.

We have a Rule 37 Motion with respect to Mr. Eugene Thompson's deposition.

I'll take those up any way you want to.

Mr. Devaney: Very well.

I believe the first one logically, Your Honor, would be this Motion to Compel the answer of Eugene C. Thompson.

We set forth in the motion that Mr. Thompson
296 was instructed not to answer a series—

The Court: I'm curious about one thing. How is this going to help us in this application here? Do you

suggest you go back and get further answers and then consider them?

Mr. Devaney: Well, it helps this way, Your Honor: It is part of—we have not yet put on any witnesses to put on our own case, but it goes to the question of the entitlement to the preliminary injunction. It goes in part as to whether or not there has been any failure or refusal on the part of the defendant to refuse to bargain itself.

The primary contention of the Government in its application and in its motion in support of the Motion for Preliminary Injunction is, as I read it, that the Florida East Coast has refused to bargain because, by way of example, it insisted on the presence of a Court Reporter.

Now, in part, these questions which were asked of Mr. Thompson—

The Court: Well, isn't the main thrust of the
297 Government's here not at whatever reason caused the breakdown of bargaining but the fact that, the claim that this carrier has resorted to self-help without exhausting the Railway Labor Act procedures?

Mr. Devaney: Well, this is their contention.

The Court: Regardless of what caused it to break down.

Mr. Devaney: This is certainly their contention, Your Honor, but the difference as to how this comes about, I believe that the first contention that the Government makes is that the operation of the railroad from February the 3rd forward, that we could not operate except in strict compliance with the agreements that were in existence before the strike took place.

Now, it is true that they are contending that this was improper on the part of the railroad. Now, this was one of the issues, as I said yesterday, that was involved in the BRT case and it is one of the main issues that is now
298 before the Court of Appeals in 21356. But it is reiterated here that as soon as we resume service, we could only resume service by complying to the

letter with the agreements that were in force before the strike began.

Now, they then say that the change in agreements pursuant to the two Section 6 notices, the one relating to the union shop and the second relating to the September 24 notice to change the agreements and place into effect this uniform agreement, that we did this improperly.

Now again, we have said that we were justified in doing this because the unions refused to bargain. It was the unions, not the railroad, that refused to comply with the provisions of the Railway Labor Act.

Now again, those issues were involved in 64-40, but—

The Court: Well, if the bargaining broke down because it broke up in a fist-fight or because everybody got drunk and nobody knew what was going on or one side or the other objected to the Court Reporter or whatever the reason, the bargaining broke down. Either side had
299 the right to invoke the services of the National Mediation Board, didn't they? That's the thrust of this complaint.

Mr. Devaney: This is the thrust of their complaint.

The Court: Oh, he says—I looked back at his complaint while you were talking. Numbered Paragraph 6 of the complaint says:

"On October 18, 1963, representatives of the Carrier met with representatives of the 17 Labor Organizations to discuss FEC's proposed changes of September 24. The conference was terminated after representatives of the Labor Organizations objected to the presence of a Court Reporter."

That isn't any attempt, to my mind, to assess blame or to give a reason, to say who was at fault, for the negotiations breaking down. It is a statement of fact that they did break down and it's undisputed that they broke down and that they broke down for this reason; isn't that right?

Mr. Devaney: Well, I think that is correct, Your
 300 Honor, but the question that they have raised is,
 of course, carried out in their memorandum in
 support of the Motion for Preliminary Injunction. Now,
 there they actually argue the question that we had no right
 to insist upon the presence of the Reporter and that, when
 we did so, we were refusing to bargain.

The Court: Yes, sir.

Mr. Devaney: Now, it is because this issue has been
 raised, as if Florida East Coast in each of these instances
 has refused to comply with the Act by refusing to bar-
 gain, that we have raised as a defense to that the question
 that we were entitled to have a Reporter present.

Now, I concede, Your Honor, that the other issue is also
 present, namely: Whether, assuming that this were true,
 a party may still make this change even if the unions came
 in, as we believed the unions did here, and say flatly with-
 out any reason that "We refuse to bargain". Now, I
 concede that the question, the legal question, is
 still present: Can a carrier, where the unions refuse
 301 absolutely to enter into bargaining, refuse to take
 the first step required by the Railway Labor Act,
 is there any right to go ahead and make the changes?

Now, we feel, of course, this is present here and no matter
 what happens on this Reporter issue, I concede that that
 is still present and it is one of the arguments—

The Court: I'm looking at your answer. I think
 probably this thing is raised. It is in the case; I think
 it is in the case. I think you are right about that; it is
 in the case.

Mr. Devaney: Now, the other issue which is raised,
 Your Honor, is whether or not the Government itself can
 refuse to assign a Mediator, as the Mediation Board has.
 I mean, it has taken jurisdiction. It has said, "We are
 going to assign a Mediator." It has sat on the cases. It
 has not assigned a Mediator. As to whether or not they
 are in compliance with their own obligations under the

Act, and if they are not, whether or not this does not
 bar the Government from coming in and asking for
 302 this injunctive relief.

And further, it goes to the question as to whether
 or not, even if injunctive relief were to be granted, whether
 the carrier is entitled to, even if it were to be granted, to
 this being conditioned on the Mediation Board fulfilling
 its obligation.

Now, what the deposition of Mr. Thompson was directed
 to in part was the attempt to develop what actually
 occurred with respect to the Reporter issue and to the
 issue of the assignment of Mediators to this case. And on
 everything that we asked, the door was closed, on the
 assertion that this was privileged. And that's why we
 believe that this in part is relevant to this matter of the
 preliminary injunction because it goes to whether or not
 the Mediation Board has acted as if it were required to
 act under the Railway Labor Act, whether or not it has
 failed to assign a Mediator and whether in fact the
 Mediators themselves have failed in their obligation to
 attempt to mediate the dispute.

Now, these are not all covered by the Motion to Compel
 the answer of Mr. Thompson but they are
 303 all—the first two certainly are—involved, namely,
 the Reporter issue and the operation of the Media-
 tion Board in the assignment of Mediators to this case.

Now, I think the questions illustrate this quite pointedly
 and I think the question or the assertion of the privilege
 indicates that it's without foundation. And if I may, let
 me read just a couple of them.

The first one:

"Q. And do Mediators customarily make notes, during
 the course of their meetings with the parties, from which
 they prepare this report?

"A. Some do and some don't.

"Q. With those who do have you found that this inter-
 ferer in any way with the course of negotiations?

"Mr. Shapiro: Objection. This deals with the procedures and techniques by which the Board conducts its mediations and, as to these matters, the practice is privileged, and I instruct the witness not to answer."

304 The next one was:

"Q. Now, do you recall, Mr. Thompson, that in this report that Mr. Newlin indicated that the company had requested that he proceed with his mediatory efforts, and that he had declined to do so?"

The Court: What page is that?

Mr. Devaney: This particular one, Your Honor, is at page 9.

The Court: I've got it now.

Mr. Devaney:

"Mr. Shapiro: Objection. This consists of the Mediators' reports to the Board and are confidential. They relate to the manner in which the Mediation Board conducts its mediation functions. They are privileged and I instruct the witness not to answer."

The next one:

305 "Q. Did Mr. Newlin report in this reports, Mr. Thompson, any conversations between himself and officials of the Florida East Coast Railway Company?

"Mr. Shapiro: I object to the question on the ground that the contents of the Mediator's report are privileged, and I instruct the witness not to answer."

The next question:

"Q. Mr. Thompson, in the course of your experience with the Mediation Board, first as a Mediator and then as Executive Secretary, isn't it true that Reporters have sat in on Mediations on various occasions?

"Mr. Shapiro: I object on the ground that this deals with the practices and procedures of the Board in con-

ducting mediations and I instruct the witness not to answer."

Now, we could go through each of them, Your Honor, but I believe that each one of them clearly indicates
 306 that there is nothing privileged in the material which is sought. We asked for material that related to what had occurred with regard to the Florida East Coast. It did not—we did not ask for information concerning any statements of position by the other parties. We asked for, as much as we could, for factual information within the possession of the Mediation Board, and he declined to answer.

Now, when we reached the question of the assignment of Mediators, on page 4, number 7, the question was:

"Q. Now, was there any reason, Mr. Thompson, why these particular cases, including five cases docketed by your Board on or after January 1st of 1964, were assigned to a Mediator whereas cases going back earlier in 1963, and the one in 1962, have not been assigned to a Mediator?"

"Mr. Shapiro: I object to the question on the ground that this deals with the reasons why the Board assigns or
 307 does not assign Mediators. It relates to its deliberations and is, therefore, privileged."

I asked in Number 9:

"Q. What action is contemplated or is normal for the Board to take when it is considering these cases?"

"Mr. Shapiro: Objection. That goes to the Board's deliberative processes. It goes to the practice of the Board in conducting mediation.

"I instruct the witness not to answer."

And so we go all the way through, Your Honor, that the door was closed and yet they are contending that we have not complied with the requirements of the Railway Labor Act. Yet the Mediation Board itself has not assigned a

Mediator, has not undertaken, as it is required to do, the mediatory function imposed by the Act.

Now, unless and until they have complied with their obligations, it is our position in this case, Your Honor, that they cannot come here and obtain injunctive relief on the theory that we haven't bargained, when the Mediation Board has not permitted the bargaining under its auspices to go forward.

308 Now, we believe that there is nothing in these questions which was privileged. I think that the decisions clearly indicate that where the United States is a party, as it is here, that the United States is treated as any other party is treated.

Now, this means that as to matters which are privileged, there are instances in which a privilege has been recognized for special reasons. Certain informers are protected. This is not a case of informers. We have not asked here for any confidential material which was furnished to the Board by one of the parties, which the Board received in the course of any investigation. We have asked what the Board did with respect to the cases docketed involving Florida East Coast and whether it had or had not done certain things and why it had not done certain things, and we asked that those questions be answered and they were denied.

Now, related closely to this is our Motion for the Production of Documents. Now, one and two, we do not desire to put the Government to any undue burden. If this poses a problem for them at the moment, I'm sure that
 309 the documents which they do have in their possession and have with them would at least be the first step. But items three and four deal with the minutes of the executive meetings of the National Mediation Board, which were referred to by Mr. Thompson and which he said were held—at one point in his deposition he said that there was an executive meeting on March 25, and he later said no, they never did have it because Mr. Newlin's report

hadn't been received. And he later said well, they had read it but he still hadn't done anything; so I don't know what they had, but he said they keep minutes of these executive meetings and we simply are asking that we be given those minutes as they relate to the Florida East Coast.

Now, we are not asking for any position of the unions. If that is involved in any of them, this is not the purpose of this motion at all.

And, in number four, we are again interested in the reports of the Mediators and, again, we are not seeking to gain the position of the unions in this dispute at all.

And we believe that all of this is material that we
310 have every right to; and having examined the various decisions, I do not find that there is any justification for the claim of privilege here.

Now, I might say that the Fifth Circuit Court of Appeals in '61 has had occasion to examine into a claim of privilege which was raised under 5 U.S. Code, Section 22. Now, they said that this was a housekeeping regulation, that Congress did not intend to give the head of any executive department the right to determine what is privileged and what is not, that that is the proper function of the Courts to determine.

Now, the decisions of the various Courts in looking at the question of privilege have never granted a privilege to a communication of this sort where the United States is the plaintiff and where it is one of the specific issues raised in the litigation.

The Court: That is the submission both on the Motion for Production under Rule 34 and the Rule 37 Motion?

Mr. Devaney: Yes, sir, 37(a); both 34 for the Production and 37(a) for the Motion to Compel Answers.

311 The Court: Thank you.

Mr. Shapiro: I would like to address myself, first, to the Motion to Compel Answers. I am a little concerned because it's asking that Mr. Thompson be directed to answer certain questions. Mr. Thompson is not here in this

District and Rule 37(a), which is the Rule under which this motion is filed, says that if a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned as proponent of the question may prefer; and thereafter, on reasonable notice to all persons affected thereby, he may apply to the Court in the District where the deposition is taken for an order compelling an answer.

I think that the—

The Court: That, of course, is he may, the deponent may ask for protection or his counsel may ask for protection to go to the nearest District Judge and get it. That's permissive. I don't think that the effect of that is to take control away from the Court where the proceeding is pending.

Mr. Shapiro: Since the deponent—

The Court: That's why I said yesterday—that's what I said yesterday, it's unfortunate that, at the time the deposition was going on, some appeal was not made to one of the District Judges in the District Court of the District of Columbia and some decision reached about these matters, so we would either have his answers or have a ruling in there that he did not have to answer, but nothing was done at the time apparently by the parties. The deposition was closed up and—

Mr. Shapiro: That's right.

The Court: —and sent on in here to this Court.

Mr. Shapiro: Yes, sir. Since the deponent isn't here, I don't know how he can be directed to answer. And I would think that the proper form in which this should come up is the Court in the District of Columbia, which issued the subpoena under which Mr. Thompson was deposed.

Now, passing from that and assuming that the Court will pass on the motion here at this time—

The Court: Rule 30(b) is involved, too, I think. That doesn't go to the questions actually.

Mr. Shapiro: I think 30(b), Your Honor, is for the protection of the deponent. And 37(a) is for the protection of the party who poses the questions, and it does say expressly that the Court in which the—the Court in the District where the deposition is taken is the Court to which one applies for an order compelling an answer. Of course, the witness is then present and can be directed by the Court to answer.

The Court: 30(d) may come in; I don't know. There were certain things that could have been done at the time the deposition was going on anyway that were not.

Mr. Shapiro: I think 30(d) I would have invoked if I had believed that Mr. Thompson was being harassed
314 and the like, but I didn't feel I had a basis for that.

The Court: Bad faith, and so forth.

Then there would be an application to the Court in the District where it was being taken.

Mr. Shapiro: Yes, Your Honor.

The Court: To control the scope and the manner of the taking of the deposition.

Mr. Shapiro: Yes, sir. This, again, would relate to protection of the deponent and not compulsion of the deponent to answer.

It's my belief that under the Rule, he should be, if he refuses to answer and the questioner wants him to do so, he should bring him into the Courtroom and ask that he be directed to answer.

The Court: I don't believe I have the power to impose a sanction on the Government by way of paying costs and paying attorneys' fees, and so forth, that 37(a) carries either—the specific statute covering it.

315 Mr. Shapiro: I think, Your Honor, that the sanction that you would impose if it were necessary that it be done would be only if there was a refusal to answer

or a refusal to comply with an order of the Court directing that the witness do so—Mr. Thompson do so.

The Court: The thing that bothers me, I don't have Mr. Thompson here. That doesn't reach his place of residence.

Mr. Shapiro: That's why—

The Court: And Mr. Thompson, it would be very difficult for me to enforce any requirement on Mr. Thompson. I might be able to direct that counsel for the Government produce Mr. Thompson at a further hearing in the City of Washington and—

Mr. Shapiro: If this motion—

The Court: —and say that the relief that you seek is going to be withheld until you do produce him and
316 withdraw your objection to his answering the questions, or do something of that sort. I don't know any way I can get him down here, or any punishment or sanction I can—anything I can do to him.

Mr. Devaney: Your Honor, may I interrupt just a minute? I don't mean to be injecting myself before Mr. Shapiro has completed his statement but I believe Your Honor's analysis is quite correct.

Number 1, the cases have held that the penalty of costs against the Government will not be allowed, but they have also quite clearly held that the way, if there is a refusal, it's true that the deponent is not here before this Court, but if there were a refusal to answer, then this Court could withhold the relief, it could dismiss the complaint. There are a number of decisions that so indicate. It's this Court that really has the ultimate control over what happens. It's not over—it's not a personal—with Mr. Thompson, this is not a personal refusal. This is a question of privilege which was asserted—

The Court: He was directed not to answer.

317 Mr. Shapiro: Yes, Your Honor, that is true.

Mr. Devaney: That is correct.

The Court: That part is very clear.

Mr. Shapiro: Well, Your Honor, again, glancing at the full text of Rule 37, my impression is that since the Rule provides that the deponent who is directed to refuse to answer will be brought before the Court in the District where the deposition is being taken, the sanction is expressly stated in the Rule. If the motion is granted that the witness answer the question, then there are certain sanctions that follow if the refusal was without substantial justification.

If the motion is denied and if the Court finds that the motion to compel the witness to answer was without substantial justification, there are certain sanctions that could be imposed on the person who dragged the deponent down to Court. Those are the only relevant sanctions under Rule 37(a).

Now, the Government here is—

318 The Court: Well, I think, as I suggested and Mr. Devaney seemed to agree, I think I can make some law of my own to take care of the situation. I can provide—I think I'm free to provide an appropriate device that would operate directly on the parties before the Court and let them worry about getting hold of Mr. Thompson and handling him.

Mr. Shapiro: I would think this might be covered—it wouldn't be a matter that Your Honor would have to devise on. I think it's covered by Rule 37(b)(2), dealing with failure to comply with order.

The Court: Well—

Mr. Shapiro: And there again, the provision appears to be exclusive:

“If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a)—”

The Court: Requiring him to answer—well, it doesn't, maybe it doesn't quite hit it but there isn't any real
319 question about being able to work something out.

Mr. Shapiro: Well, in turning—

The Court: I could just simply say right now that this—for instance, that this hearing could adjourn until after this deposition had been completed and Mr. Thompson has answered the questions. That seems to me to be about as effective as anything else I could do.

Mr. Shapiro: Well then, I think—

The Court: Let's get to the merits of it.

Mr. Shapiro: Let's turn to the merits of the motion.

The Court: To the source of the claimed privilege.

Mr. Shapiro: All right.

The first question is one of relevance of these questions. What are the issues in the law suit?

Well, Mr. Devaney has characterized them in terms
320 somewhat different than I understand the complaint and our Motion for Preliminary Injunction.

First, we are complaining that the carrier has put into effect certain rules, rates of pay and working conditions without going through the formal procedures of the Railway Labor Act.

Now, we claim that because they didn't go through those procedures, they are violating their duty to bargain in good faith.

It is not our claim that their insistence on the Court Reporter is itself the violation of the Railway Labor Act.

It is, as Your Honor stated earlier, simply the occasion which led to the break up of the bargaining conference.

Now, as to that issue, how Mediation conduct mediation and how the Mediation Board conducts mediation is not relevant.

The only thing that is relevant really is the fact that the conference broke up, for whatever reason it broke up; that the carrier put its rates of pay, rules and working conditions into effect at a time when the services of the
Mediation Board had been seasonably invoked.

321 Now, these questions about how the Board conducts its mediation function do not relate to that issue.

On the second issue, which I understand the claim is made to which these questions are said to be relevant, goes to the defense that the refusal to bargain, as it is put, of the unions justified the carrier's putting these rates of pay, rules and working conditions into effect.

Now, if they do, that seems to me to be a purely legal issue and, again, how the Mediation Board conducts mediation is not relevant to that defense of compliance with the Act.

We have a position on the merits on that which is in essence that a refusal of one side or the other side to bargain, which is followed by invocation of the Mediation Board's services, does not excuse either side from its obligations under the Act and that they cannot resort to self-help if the services of the Board are invoked.

Now, that's our contention, but the issue that's involved in that aspect of the case is simply a legal issue. There's certainly no necessity for probing the functions of
322 the Mediation Board on that issue.

Now, the third matter which has been raised, and again, this is a matter of defense, is that since these cases were docketed by the Mediation Board, it has not mediated.

I think again that this, as we shall try to show, is irrelevant. The fact that the Board has not mediated is established. How and why the Board mediates, hasn't acted, is not the crucial issue. The question of whether this is a defense at all comes up. I think we might as well face it briefly.

First, I would like to emphasize that this suit is not by the Mediation Board but by the United States. Part of the ground on which the United States claims standing here is that it's seeking to protect the function of the Mediation Board.

Now, the carrier in this case informed the Mediation Board at the very moment that its services were being invoked that the labor organizations did not have the right to invoke the services of the Board and, therefore, it was

putting its rates of pay, rules and working conditions into effect.

323 It's the Government's position that when it did that—put these rates of pay, rules and working conditions into effect—it violated the Act by doing that at the outset.

Now, the Mediation Board advised the parties of the Section 6, but since the carrier's position was that the Mediation Board had not jurisdiction and since the Government's position is that the carrier is in violation, we have the unique argument being made that the Mediation Board's failure to mediate after the carrier violated the Act bars the United States from taking steps to remedy that.

Now, the whole purpose of the Railway Labor Act's status quo provisions are to establish a climate in which mediation can take place, to establish that there be an atmosphere of stability for the Board to carry on its functions and for the parties to carry on their negotiations under the auspices of the Board in.

That atmosphere was destroyed, in the Government's view, the minute the carrier put its rates of pay, rules and working conditions into effect, at the very beginning of the invocation of the Board's jurisdiction. There-

324 after, the Mediation Board did not mediate. How can it be relevant to the issues in this law suit to say that, after the carriers violates the Act, somehow the Government is foreclosed from doing something to restore the status quo the Act requires? Because it doesn't carry on with mediation which the carrier refuses to recognize and which the carrier treats as being in violation of the Act?

I don't see how these questions about why the Mediation Board hasn't acted go to that issue. The fact of the matter is that the Mediation Board hasn't acted. The fact of the matter is that the carrier is, at this late date, some six months after the invocation of the Board's services by

the unions, suddenly demanding that there now be mediation, and it is demanding this while it has had these rates of pay, rules and working conditions in effect. It is saying in short that the Mediation Board's failure—that the Mediation Board failed to cure our violation of the Act by coming down and mediating and then discharging us from responsibility to maintain the status quo by proffering arbitration and getting out of the case. All the time, however, they have had—they had changed the
 325 status quo.

Now, these questions just don't go to that legal issue. The legal issue is plain, whether this is a defense or not.

Now, finally, if the questions are considered relevant—I have one or two additional remarks. Perhaps, before I turn to those additional remarks, there's one other thing I should say about this claim that the Board's failure to mediate cures the violation of the Act.

I think the carrier here is really advancing the contention that it might advance if it had been in compliance with the Act.

Let's take the case where they did not change the status quo, they did not put these rates of pay, rules and working conditions into effect. They did not abrogate the union shop agreements, and the Mediation Board's services were invoked, and then the Mediation Board doesn't mediate.

Now then, they've got a pretty plain remedy, it seems to me. After a reasonable time if the Board hasn't acted and hasn't responded to a demand that it act, they could go into Court seeking an order directing the Board
 326 to either start mediation or to discharge them from the obligation to maintain the status quo so that they can resort to self-help. But that's not the situation in this case at all.

This is a case in which the carrier put the changes into effect as soon as the Mediation Board's services were in-

voked and the carrier refused to recognize the Board's jurisdiction. And it's just not in position to complain of the failure to mediate when it has itself failed to maintain the status quo under the statutes.

Now, the Government is bringing this suit and claims standing to vindicate the purposes, the processes, of the Railway Labor Act.

If the injunction is granted, the Court may very well condition it on some requirement that the Mediation Board promptly undertake mediation. I think that's within your equitable discretion and I dare say the Board would be more than willing to try, once the statutory condition, the statutory atmosphere, is restored. But these questions don't go to that issue; they go to questions about how the Board conducts the mediation function, and this gets us directly down to the issue of: Are these questions
327 privileged?

I have to say a word about the Mediation function, first of all. Mediation is not in any way similar—

The Court: Excuse me. Before you start; there's nothing in Section 5 of the Railway Labor Act indicating that it is privileged, is there?

Mr. Shapiro: No, there's no statute which expressly states that the Mediation Board's activities are privileged. There is, however—

The Court: That's another reason really that I would prefer this application had been made to one of the Judges in the District of Columbia. They are right there where all these Government departments are and everyone of them holler "privilege" whenever they get in Court, and those Judges up there are accustomed to it and have it more often than I do. I've had it in a good many other Government departments. It has usually been difficult for me to see where a privilege existed that they
claimed.

328 Mr. Shapiro: Well, I would state, first, Your Honor, that at least as far as this Department of

Justice lawyer is concerned, the invocation of privilege on behalf of a Government Agency in a legal proceeding, when we base this on a claim that it's privileged because of some peculiar Governmental aspect of the claim—

The Court: I want you to—

Mr. Shapiro: —it's extremely serious.

The Court: I want to have your position in mind. I don't want to discourage you by making that observation, but I do say that one of the Judges in the District of Columbia might be more familiar with handling this type of claimed privilege, because they are dealing with the Government departments more than we are.

Mr. Shapiro: Well, I was going to say that the invocation of the privilege is not done lightly, at least not by the

Department of Justice. We consider it very, very
329 serious because the Government as a whole, at least in the Department view, should operate to the extent it's possible in a glass bowl. Now, to decline in a legal proceeding to make matters public, to make matters available to the parties, is very serious and we recognize this and we haven't raised this privilege lightly. There are very strong and compelling reasons why the Mediation Board's processes must be protected.

I was groping about, Your Honor, for a copy of the National Mediation Board's Rules of Practice. I had it in my hand until a moment ago.

The Court: Why don't we stop a few minutes and then proceed in about ten minutes.

(Short recess)

Mr. Shapiro: I just thought I would sum up the positions—

The Court: Well, I thought at this time you would go into the privilege question.

Mr. Shapiro: All right, Your Honor.

The National Mediation Board has Rules of Procedure which are published in Title 29 of the Code
330 of Federal Regulations, from Part 1201 to Part 1206.

Rule 1202.15, entitled "Non-disclosure of Information", recites the considerations upon which the Board bases its claim for confidentiality of some Mediation Board records and public availability of others.

The Rule states, in the first paragraph:

"Public Policy. A successful effectuation of the National Mediation Board's mission under Section 5, First of the Railway Labor Act, as amended, requires that members, officers and employees of the Board maintain a reputation for impartiality and integrity. Labor and management or other interested parties participating in mediation proceedings must have the assurance and the confidence that information disclosed to members, officers and employees of the Board during the mediation process will not be divulged needlessly."

The Rule continues:

331 "The formal documents such as the invocation or proffer of mediation and the reply or replies of the parties, the proffer of arbitration and the replies thereto, and the notice of failure in mediatory efforts in cases under Section 5, First of the Railway Labor Act as amended are matters of official record and are available for inspection and examination by persons properly and directly concerned at the offices of the Board in Washington, D. C."

Now, the Rule continues that:

"All reports, information or documents other than those specified in Paragraph (b) of this Section obtained or prepared during the mediation process by the National Mediation Board, its members, officers or employees for Board use in the course of official activity under Section 5, First of the Railway Labor Act as amended are hereby declared to be confidential. Officers and employees are here-
332 by prohibited from making such confidential report, information or document available to anyone other than a member, officer or employee of the Board unless the Board authorizes the disclosure of such information or the production of such document."

Now, this question of the Mediation Board's deliberations and procedures for conducting mediation came up in this case before Judge Curran of the District Court for the District of Columbia a week ago last Monday. The carrier subpoenaed the Executive Secretary of the Board, Mr. Thompson, and the three members of the Board as well.

The Court: You mean for this?

Mr. Shapiro: For this proceeding, yes.

The Court: For this proceeding?

Mr. Shapiro: Yes.

333 The Court: Well, this thing has been—

Mr. Shapiro: This thing, is part, has been.

Now, the Government moved before Judge Curran to quash the subpoenas on the members of the Board and we based that upon our contentions that there were no factual issues germane to this law suit as to which their testimony on their deliberations, their mediatory processes, the Board's mechanics for conducting mediation were relevant.

We also contended that, insofar as the questions seek to know why the Board has acted or not acted, it's an attempt to explore the deliberations of the Board, which we consider to be privileged.

And finally, because the mediation process itself by its very nature is one which requires that a lawyer-client-like confidentiality be maintained.

Now, there's a further aspect to that, Your Honor. Mediation is a subtle and difficult art. It's not something that's a rational procedure in which you take positions

and compare them and try to maintain a consistent
334 approach. Each mediation problem is different.

Each situation involves strong-willed men, on opposite sides, firmly convinced of the rightness of their positions, who have to be manipulated and maneuvered and cosseted and persuaded. They have to be taken off into a corner and talked to. There may be attempts to cut one of them out of the mediation because he's being too obstreperous. There may be an attempt to induce somebody

else to come in. The techniques vary fantastically and they require that the Board decide how it's going to handle these cases, in complete and utter confidence even among itself, so that there are times when the parties to the mediation will not know what's in the members' minds, what the National Mediation Board has instructed their Mediators to do, that the Mediation Board is interested in trying by some technique or other to get people to agree.

Now, that whole process rests on a complete confidentiality. If you open up the Board to the processes of the Court so that someone can explore their techniques, so that it becomes a public matter as to how they work and what they do, then the effectiveness of the Mediation
 335 Board is gone. Mediation is so sensitive and such a remarkable, unusual process that it can't be made a public matter.

Now, that's why we consider this matter of privilege to be so important and why we raised it here.

Now, there's no reason why we should have to reach this difficult privilege question, if there are no issues which are germane to this litigation and more particularly to this application at this time. And we think there are none. We think that there is in 5 U.S.C. 22 authorization for the National Mediation Board to promulgate a regulation designed to protect its processes. And we think, quite beyond that, that there is a genuine and recognized evidentiary privilege, quite apart from the Governmental nature of it, which requires that mediation and mediation functions be kept completely confidential.

And finally, we are dealing with a Government Agency engaged in this, what is for the Government, extremely unusual situation of standing between private parties and trying somehow to bring them together by almost any means that anyone can think of. The Board, as a Board,
 336 has to deliberate and plot tactics and methods of handling each individual case, of instructing their Mediators and of trying to influence the parties to come to agreement.

Its deliberations are certainly a matter which are privileged. Since neither the Board nor its members' minds can be probed in any event under the doctrine of the *Morgan* cases, at 304 U.S. 1, and 313 U.S. 409,—these are cases which bar attempts to go to an official and ask him why he has decided this or how he decided that or how he deliberated it. We don't probe the mind that decides, that has the responsibility for deciding. You may set aside his decision in some way—

The Court: That doesn't have much bearing on asking Mr. Thompson what occurred or asking for documents that bore on what occurred.

Mr. Shapiro: Now, we turn to the specific questions, Your Honor: "With those who do or those who don't take notes of meetings, do you find that this interferes in any way with the course of negotiations?"

I objected and directed the witness not to answer that, because I felt that it related intimately to the mediation process.

Then there's a series of questions that follow about the Mediator's report to the Board, about what he has accomplished and what he hasn't accomplished and what difficulties he's met with, or what his problems and recommendations are.

Now, to require that to be made public is again to defeat the effectiveness of the Board, because, if it can be done here, I think it can be done elsewhere.

Now, there was a question asked Mr. Thompson about his experience as a Mediator and whether Reporters had sat in on mediations on various occasions. Later on in the course of the deposition, I think Mr.—that question was later answered, since, as I recall the testimony, I started to object and then revised my judgment on it, and Mr. Thompson was able to answer. The question was:

"Now, in your personal experience as a Mediator, Mr. Thompson, have you had any occasion on which a reporter was present during negotiations or mediatory proceed-

ings at any stage whatever in your own personal experience?"

338 I objected and Mr. Devaney and I exchanged views on the subject, and it ended with my saying:

"I will let Mr. Thompson answer in general terms if he can recall."

And Mr. Thompson then answered:

"I cannot recall any case I ever mediated where a reporter was present."

This is page 43 of the deposition.

So that I think Mr. Devaney did ultimately get the answer to that question.

Now, I'm just going through these questions individually. He was asked:

"To your knowledge—"

I'm going to shorten the question slightly so I don't have to read it all. He was asked whether he knew whether any—whether he had been informed by any member of the Board of a conversation that mediation has proceeded in other cases, in the presence of reporters. And I objected to that on the ground that it called for a communication between the Executive Secretary and a member of the Board; and of course, I think it's a hearsay matter anyway and I would object if the answer to that question were attempted to be introduced in this proceeding.

339 Again, I think communications between the Executive Secretary and members of the Board about what the Board has done in the mediation are and should be privileged matters.

Now, he was asked reasons why certain cases involving the International Association of Railway Employees were docketed by your Board—I'm sorry.

"Are there any reasons, Mr. Thompson, why these particular cases, including five cases docketed by your Board on or after January 1st of 1964, were assigned to a Mediator, whereas cases going back earlier in 1963 and one in 1962 have not been assigned to a Mediator?"

Again, this goes to why the Board has assigned the case or not assigned the case. It also goes, not to—well, it relates really to the Board's deliberations once more.

Now, the fact of the matter is and this record will show that, as to the particular rule changes we are involved with here, the Mediation Board has not sent a Mediator.

That's plain; we don't deny it. And it's our position that as a legal matter that's irrelevant to the issues in this case. To take this irrelevant issue and then to permit Mr. Thompson, as the Executive Secretary, to try and recount what the Board itself has deliberated on after Judge Curran has held that the Board members themselves need not give testimony on this matter, would—

The Court: Is that the extent of this Order? You never did get around to telling me what it was.

Mr. Shapiro: His Order—

The Court: It is not attached to this deposition or otherwise made a part of this record, is it?

Mr. Shapiro: No, Your Honor. I have a copy. Now, the Order—I have a copy, not certified, just a working copy which I can make available.

The Court: At any rate, he relieved the three Board members from appearing; is that right?

Mr. Shapiro: He did. Now, we represented in that argument, Your Honor, that Mr. Thompson would be available to testify on matters not privileged. And the thing that I was trying to achieve, I don't know if I was over-zealous on some occasions, but the thing I was trying to achieve was to prevent the carrier from exploring through Mr. Thompson the matters which they couldn't explore with the members of the Board, that the privilege that we intended to assert was intended to be coterminous with what we hoped was Judge Curran's grounds for decision.

Now again, I should state that all that Judge Curran's Order states is that the subpoenas directing the appearance of the Chairman and members of the National Medi-

ation Board, taking their oral deposition, be, and the same hereby are, quashed. Judge Curran ruled from the Bench. There was no other opinion, other than his decision, and we could not explore his deliberations on it.

The remainder of these questions, I think, go along the same line. Now, there may be one or two, I think, on which I have been over-zealous. I'm not quite sure without going through them more carefully than I can at this time; but I don't think that we've got a situation at
 342 this time in this proceeding that requires that we suddenly stop and wait for Mr. Thompson's answers. This law suit is going to go on, I expect, if Your Honor doesn't grant the Motion to Dismiss or, rather, hold that you have no jurisdiction; and if it does continue, there will be further discovery on both sides, I have no doubt. This matter has come up in the middle of this hearing and it has come up on a few moments' notice. I think that this can be considered at a later time in any event.

Now, if it's insisted that these questions are vital to the carrier's defense, we insist that they are not vital, that they are not germane to any factual matter that's involved, we think that these matters are privileged because of the very nature of the Mediation Board's functions.

There remains a further matter that, if the witness is to be directed to answer these questions, since they relate to matters which we believe fall within the regulation of the Board, he would have to apply to the members of the Board for permission to answer. If he were directed not to answer by the members of the Board, the Government would probably be required to file a formal claim of privilege.

343 Now, under the case of *United States v. Reynolds*, and I confess I have forgotten the citation of it—
 Mr. Edelman: 345 U.S.

Mr. Shapiro: I'm told it's 345 U.S. 1.

It's laid out that when the Government makes a formal claim of privilege, the matter must be considered person-

ally by the head of the agency involved and he must make his claim in writing in a document filed with the Court.

And we would ask that this opportunity be accorded us.

I think these matters could be more—as effectively considered in the District of Columbia where the witness is available and where he will be able to consult with the members of the Board in the event the Court should decide to direct him to answer any of these questions, so that the Board can finally review my claim of privilege on its behalf and decide whether they want to assert it or not.

Now, that has been addressed to the Motion to Compel

Mr. Thompson to answer, even if he is not present
344 here.

There is also the Motion for Production of Documents, which has just been served. Glancing over it, it appears to me that most of what is sought relates to matters of communication between the Department of Justice and other Government Agencies.

Now, there is a well-established and recognized privilege with respect to documents in a law suit or no, and this privilege is recognized even though there is a case in which the United States is the plaintiff. At least, that is my understanding. This is the matter of inter-agency communications and recommendations.

There is a case, *Reynolds Aluminum Company v. United States*, in the Court of Claims, decided by Justice Reed, sitting by designation. And my recollection of the citation, although this may be faulty, is that it's in 153 F. Supp.

Mr. Devaney: Federal (2nd) or Federal Supplement?

Mr. Shapiro: It's Federal Supplement.

345 Mr. Edelman: 157 F. Supp.

Mr. Shapiro: I'm sorry, 157 F. Supp. 939. I'm giving the completely wrong citation. The name of it is *Kaiser Aluminum and Chemical Corporation v. United States*.

The Court: What is the name?

Mr. Shapiro: Kaiser, K-a-i-s-e-r.

The Court: Kaiser Aluminum instead of Reynolds Aluminum?

Mr. Shapiro: Yes, sir, and it's 157 F. Supp. 939, decided by Mr. Justice Reed, sitting by designation.

The Court: Rives?

Mr. Shapiro: Reed.

The Court: Reed, oh! Mr. Justice Reed.

Mr. Shapiro: Mr. Justice Reed.

Now, I do want to state, in the course of that 346 case, the United States was a defendant. The

United States is always a defendant, of course, in the Court of Claims. But he does review there the considerations relating to the privileged nature of communications between Government Agencies.

I think the second item listed in the demand for production is covered both by the privilege—well, it's covered by the same thing, this privileged nature of communications between Government Agencies. The Department of Justice is, after all, a legal agency and most of our communications with other agencies deal with legal questions.

I think I would invoke as well the classic lawyer-client privilege for the Department, since this is definitely involved.

The third item:

"Minutes of all Executive Meetings of the National Mediation Board from January 1, 1963 to date dealing with Florida East Coast Railway Company."

Again, the considerations which I have indicated earlier with respect to Mr. Thompson's affidavit—their position, would apply to this—deposition, would apply to this question of minutes of executive meetings, privileged 347 and confidential nature of Mediation Board's functions.

And the same thing would apply to the fourth item:

"All reports of Mediators from January 1, 1963 to date."

Again, as a procedural matter, these matters can't be made available until the Board has had a chance to examine.

We have had occasions on which agencies have waived privilege on certain matters. Perhaps this is such an occasion. If it's not such an occasion and the Court should not agree that the Mediation Board's function is privileged by its very nature, then a formal claim of executive privilege might be made after consultation.

The Court: Do any of these documents called for, so far as you can see, fall within 1202.15(b), Non-Confidential Records?

Mr. Shapiro: I don't—

The Court: I can't see that any of them—

348 Mr. Shapiro: I don't believe they do. I'll be happy—

The Court: This says:

"The formal documents—such as the invocation or proffer of mediation, the reply or replies of the parties, the proffer of arbitration and reply thereto, and the notice of failure of mediatory efforts—in cases under Section 5, First, of the Railway Labor Act, as amended, are matters of official record and are available for inspection and examination by persons properly and directly concerned at the offices of the Board in Washington, D. C."

That's the non-confidential.

Mr. Shapiro: That's right.

The Court: And sub (c) goes into what they classify as confidential mediation records.

349 Mr. Shapiro: Some of the items in the first paragraph of the Motion for Production may come within that rule and we would be happy to make anything that comes within the first paragraph of the rule available.

The Court: I do notice that CFR gives the authority for 1202.1 to 1202.15 as 45 U.S.C. 151-163, rather than 5 U.S.C. 22.

Mr. Shapiro: I think the reason that is done, Your Honor, is that the Board considers the definition of its functions in the Act to generate this requirement of confidentiality. They think that this is a natural concomitant of their role.

The Court: Yes, sir.

Mr. Shapiro: I do not know at this moment of any express language in the Railway Labor Act which declares the Board's function.

The Court: It would be in Section 5 if it was there, I suppose, wouldn't it?

350 Mr. Shapiro: I think it would be; that's where the Board's general role is described. And glancing at Section 5, there is simply a description of the Board's duties to attempt to bring about an amicable settlement through mediation, its duties to interpret certain documents and certain other matters. There's no express provision dealing with confidentiality.

Well, Your Honor, I think it's a question of whether we take up Mr. Thompson here and now, whether we consider any of these questions relevant to any factual matters involved in this litigation or to any factual matters involved in this application; whether the Mediation Board's functions are such that we have to recognize the privilege for it, to whether inter-agency communication and the deliberative nature of the Board's activities are privileged and whether the Government will be given an opportunity to make a formal claim of privilege in the event that you reject the contentions that I have advanced.

We believe that certainly the Motion to Compel Mr. Thompson to answer should be denied at this time and that the matter should be taken up in the District of Columbia.

351 I think that the Motion for Production of Documents should be denied, except with respect to documents which fall within Paragraph (b) of 29, Code of Federal Regulations, 1202.15. I might state that most of the—that the letters and correspondence which are germane to this litigation, I think are already in the record.

Now, of course, this is our judgment as to what is germane but the invocation—

The Court: All you thought were germane were made exhibits in Mr. Thompson's affidavit?

Mr. Shapiro: If further matters dealing with the Mediation Board's practices and procedures, with its failure to mediate in the matters involved—and I don't think it's a failure because the carrier is in violation of the Act and the conditions for mediation do not exist—that if further documents and the like are introduced on this, we will undoubtedly in the course of the carrier's defense make our objection on grounds of relevance and materiality.

Mr. Devaney: Your Honor, if I may make a very
352 brief response to a couple of points that Mr. Shapiro made?

The Court: Yes, sir.

Mr. Devaney: First of all, I note that in his quoting from the Code of Federal Regulations, that he very correctly read but I don't believe that he emphasized very strongly and I would like to underscore it a little bit, that that says it shall not be needlessly—needlessly disclosed. So that even what he is saying and even if this has the application that he says it should have, they have not made any ruling here that this barred. They merely say that it shall not be needlessly disclosed.

The Court: That's in the declaration of policy?

Mr. Devaney: Yes, that's correct.

The Court: Under (a).

Mr. Devaney: Shall not be needlessly disclosed.

Now, when we filed the notice to take these
353 depositions, Your Honor, we filed it in this Court and the Government first moved to dismiss or to quash the notice, because they said we hadn't waited the 20 days after the complaint had been filed.

First, if we waited 20 days after the complaint had been filed, this would be after the Motion for Preliminary Hearing.

The Court: I think they recognize that doesn't apply to a defendant anyway.

Mr. Devaney: It does not. I merely say that—

The Court: They withdrew that in some way.

Mr. Devaney: That was withdrawn. Then they brought—they filed a Motion to Quash in the District of Columbia. Now, their Motion to Quash was served on me some time after 12:00 o'clock and we were before Judge Curran at 1:00 p.m.

Now, I merely point this out that some of the things which they have inferred here that we have somehow
354 not given them adequate opportunity, I don't believe is sustainable on the record.

Now, Mr. Edelman, before Judge Curran, said this: I have the transcript and if Your Honor would like to read it, I would be delighted to leave it with the Court, but on page number 30—

The Court: I take it there is no objection to it being read into the record?

Mr. Shapiro: No.

Mr. Devaney: He says:

"Briefly, in one sentence, my position is that these subpoenas must be quashed because the Board is an extremely busy agency composed of presidential appointees with a heavy docket which would be severely hampered if its members could be deposed in the absence of great need and importantly in this situation because Mr. Thompson stands ready to testify as to all matters not privileged which relate to the official activities and records of the
355 Mediation Board."

Now, he submitted with that an affidavit by Mr. Gamser, in which he said—

The Court: Mr. who?

Mr. Devaney: Mr. Gamser, who was a member of the Board, and he said that he was the only one in Washington on this occasion and was therefore giving the affidavit as

a member of the Board on behalf of the Board. Otherwise, I presume it would have been given by the Chairman of the Board. And he said again that if Mr. Thompson is going to submit to this taking of the deposition, he knows everything and can testify about everything that we could and therefore it is not necessary for us to be present.

Now, we haven't asked Mr. Thompson anything that, so far as I can see, has any conceivable basis to any privilege, because it does not relate to any matter that involves necessary confidentiality because it has been disclosed to the Board by some third party. And we believe very much that it's certainly material to this action that these questions be answered.

356 Now, we have contended here—Mr. Shapiro stated that the purpose of the Government in bringing this suit was to protect the functions of the Mediation Board. Then he has described that one of the elements of the complaint here is the portion which deals with the operation of the Railroad from the time the strike occurred, and it resumed operations on February 3rd not in compliance with the provisions of the Act.

Now, I don't think that the functions of the Mediation Board can possibly be said to have any relationship to that at all. And Mr. Edelman, before Judge Curran, on page 6, stated:

"The first temporary conditions of employment has no relationship to the National Mediation Board since the Board was never, since a Section 6 notice was never served and therefore the Board's processes have never been invoked."

Now, these matters which we have asked about do relate to specific questions which have been raised by the Government in their complaint. Now, one of the things concerning mediation, on October 11th—and this is
357 Exhibit No. 8 to the affidavit of Mr. Thompson,

attached to the complaint, beginning with the last paragraph, which says:

“The Board has docketed Mr. Leighty’s application for mediation as NMB Case No. A-7027 and a Mediator will be assigned to handle at a date consistent with the Board’s other commitments.”

Now, there is nothing in this to indicate that the Board in October—in fact, the first time that they have announced any such policy was in Mr. O’Neill’s letter to the company on May the 14th, 1964, and it has been reiterated here by Mr. Shapiro, that when a matter is in litigation and the Board doesn’t assign a Mediator. Back in October, all of the positions were not in agreement, Your Honor. The Board was taking the position that it properly had the case.

Now, Mr. Wyckoff has already testified that there has been no refusal by the carrier to refuse to go forward with this mediation.

Now, for the Mediation Board to take the position at one time that “We are going to send the 358 Mediator”, and six months later or seven months later to come before this Court and say, “No, that policy, we’re not going to follow it any more”.

And one other thing, Your Honor: In this deposition Mr. Thompson very clearly indicates that unless you can obtain an answer from the members of the Mediation Board or the Executive Secretary, there’s no other place you can turn. They don’t have any regulations. They don’t have any rules. So there isn’t any other way to get the information. You don’t know what has occurred except they have done or have not taken some action. This is why it becomes so important that you cannot develop any of the facts concerning the Mediation Board except through them, because they close the door to you.

Now, it’s also strange that, back in December, Mr. O’Neill was here. Now, they found no difficulty in having a member of the Mediation Board at this time testify con-

cerning activities relating to that litigation. We're not seeking, we do not want material in this case that was disclosed to the Board in a confidential nature by other people, and if we have asked any questions that lead to this, we can argue about that later. We have
 359 studiously avoided doing that.

Now, on the Motion to Produce or the Motion to Produce the Documents, I think, again, the materiality of the material is clear. I think, in the minutes of the Executive Session relating to the Florida East Coast, I think we are entitled to that. That has been put in issue in this case and there can be no reasonable basis for claimed confidentiality. And the reports of the Mediators as they relate to the Florida East Coast, this is certainly in issue; we have every right to examine the report of the Mediators as relates to this railroad.

We don't want any disclosures made by the Mediator or made to the Mediator by the unions. We would have no objection to that being deleted; but the rest of that, we think is material and we have a right to know what he reported back to the Board.

Now, there is no material here that I can see that has any question to this materiality but, as to Mr. Shapiro's statement that we ought to go back and that we ought to have the Board consider it, we've already—they've
 360 already given the affidavit of Mr. Gamser. They've already said in effect, "We are tendering Mr. Thompson. He will answer all the questions."

The Court: All questions not privileged.

Mr. Devaney: Well, that's right, but if they are asserting questions of privilege, I think that they've already asserted the question of privilege and it's now for this Court to determine whether these do relate to matters that can properly be made privileged.

And the case that I referred to by the Fifth Circuit earlier is 294 F. (2d) 868. That was the *NLRB v. Capitol Fish Company*, decided in 1961.

The Court: 294f

Mr. Devaney: 294 F. (2d) 868. Now, that case says that 5 U.S. Code, Section 22, clearly gives agencies the right to issue housekeeping regulations with respect to the retention and disclosure of certain documents, but the ultimate question or the ultimate determination as to what is confidential and what is privileged is for the 361 Courts to determine. That's why we say again,

Your Honor, that this is properly before you. It should be decided now. We are entitled to the information and we believe that it will not unduly delay the proceedings to have them go forward and answer the questions.

The Court: To have Mr. Thompson, you mean, answer the questions?

Mr. Devaney: To have Mr. Thompson answer the questions would not unduly delay this proceeding at all.

The Court: There's one further matter, please, Mr. Devaney.

Your Rule 34 Motion, at the bottom of the Motion, I suppose in an attempt to show good cause for the Motion, it says:

"Plaintiff, the United States of America, has custody and control of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached."

362 I don't find Exhibit A filed with the Motion.

Mr. Devaney: I apologize for that. After having given this, the Exhibit A was not executed and was therefore not signed.

The Court: What is it, an affidavit?

Mr. Devaney: It's an affidavit, yes, sir, Your Honor.

The Court: You can summarize it and supply it later.

Mr. Devaney: It was the affidavit of Mr. Wyckoff and it merely summarizes the material requested is within the possession of the United States Government, that it is

material and relevant to the issues in this case, and therefore requests the production of it.

The Court: Gentlemen, the Motion to Compel Answers by Mr. Thompson, without taking these questions up in detail, I consider these questions to be irrelevant and immaterial to this action, at this stage of the proceedings at least, and this is said without prejudice to a further application to take these during the further course of the law suit, to get answers to these questions. I put it on the ground of relevancy. Don't sustain the claimed privilege. And in general, there may be some of these, some of them that would come under—come broadly under a proper privilege but, in general, it does not seem to.

My view about it is simply this: That if relevancy were shown, I think that the privilege is destroyed. If it's necessary to decide this law suit, why, we ought to bring it in here and put it on the table.

The same considerations govern the decision to deny the Motion for Production of Documents. That is granted to the extent that they are relevant. Actual formal documents in the mediation proceedings that haven't been attached or produced, if anybody can specify any of those, they should be handed across the table. As far as I know, unless somebody calls my attention to one that has not already been produced, we will consider that Motion complied with to the extent that I consider it needs to be complied with at this stage of these proceedings.

364 Again, this denial is without prejudice to the right to renew the motion at a further stage of the proceedings. It doesn't comport with my theory, at least, of the way to try and determine a Motion for Preliminary Injunction to be met in the middle of the hearing with a Rule 34 Motion for a lot of documents that are at some other place and would certainly require some time to assemble and produce. I'm not convinced that relevancy is present anyway.

Now, there was a—

Mr. Milledge: There was a subpoena issued.

The Court: Sir? I see you have a subpoena duces tecum issued here which maybe should be reached and—

Mr. Milledge: If I might just suggest this: We have a Motion to Quash but, rather than to have to rule on it, the people are all here. We are probably going to break for lunch before too long. If Mr. Devaney would tell us what specifically is required, perhaps we can have it after lunch and not have to get—

365 The Court: Now, you've produced one—

Mr. Milledge: One item.

The Court: Item No. 1 in each instance, as I understand it, on yesterday.

Mr. Devaney: Yes, Your Honor.

The Court: That is the Constitution and the By-Laws.

Mr. Devaney: That's correct.

The Court: All the rest of it has been pushed along in front of us to dispose of either now or later during the hearing. I just observe in a preliminary way that it asks for everything, and there must be some things that you can specify that you need for this hearing, rather than this scattergun, shotgun subpoena.

Mr. Devaney: Your Honor, if Your Honor will consider—

The Court: You've covered the whole thing with this one document.

366 Mr. Milledge: The room wouldn't hold it all, Judge.

Mr. Devaney: The nomenclature is almost certain to vary from one union or one group to another.

The Court: Yes, sir.

Mr. Devaney: What we were interested in primarily were the Constitution and By-Laws; second, any documents including minutes of meetings at which disciplinary action had been taken, instituted, relating to the employees of the Florida East Coast since January 1, 1963.

The Court: Disciplinary action by the union?

Mr. Devaney: Yes, expulsion. We are not concerned about their internal matters of conduct, except as it relates to this.

The Court: Dropped for not paying dues, or something, you don't care about that?

367 Mr. Devaney: No, except as it—

The Court: Primarily in connection with the strike activities or related activities?

Mr. Devaney: That's correct.

Now, any other formal resolutions they have, or formal documents that relate to the strike itself. Now, we know that various documents were issued in the form of strike instructions, whether some of them may have been called "Strike Call documents", but that sort of document that relates to the action of the local union or the international union with respect to the recognition and conduct of members in connection with the strike on the Florida East Coast.

And the fourth general category would be the applications, if any, for membership or action that they've taken on applications for membership of anybody working for the Florida East Coast since January 23, 1963.

Not having that before me, those, in general, were the items or the matters relating to those categories that we were primarily interested in. Now, whether they are

368 called letters or whether they would be called resolutions or whether it would be a minute of a meeting as relates to one of these matters, we have no way of knowing. It's those general categories.

The Court: You want it whether it's in the form of a letter, a minute of a meeting, a resolution or memorandum?

Mr. Devaney: That is correct, Your Honor. And not knowing what it might have been called or what form it might have taken, we have of necessity had to use the broad coverage to make sure we have named the various things that would be involved in this.

Now, the final item, which is another category in this cause, are the expenditures.

The Court: The what?

Mr. Devaney: Their expenditures, that is, their records showing the income and outgo of their money since the strike began, receipts and expenditures.

Mr. Milledge: That's got about as much bearing—
369 I mean, that is—in the first place, the records are enormous on that, but that has absolutely no relevancy to this proceeding whatsoever. That's in really, Your Honor, the same category as that requested about strike activities. The eleven cooperating non-operating unions have been on strike since January 23rd and they still are, that's of '63, so you just are getting into the affairs of the unions there.

The only legitimate inquiry, if that is, whether they are on strike or not—and, of course, they are, there's no dispute about that.

The Court: What about the information he has asked for with respect to disciplinary action?

Mr. Milledge: It's our position that it's not relevant but we got into it in the BRT thing and I don't think we will probably have any problem about that. I don't think any has occurred.

The other thing.

The Court: Well now, there is a classification of documents called for here that, if Mr. Devaney alluded to it, I didn't catch it. He wants correspondence, memo-
370 randa and any other documents or records concerning, relating to or evidencing communication of any sort, whether in person, by mail or by telephone, between any member or officer of your organization and any member, officer or employee of the National Mediation Board, the Department of Justice, or any other department, agencies or office of the United States.

If you covered that, I didn't catch it.

Mr. Devaney: No, I'm sorry, I had forgotten that one, Your Honor, not having a copy before me. No, that is correct, that is the final category that we are interested in.

We feel that this does have a bearing. We have asked for it in these subpoenas because we feel that these people, in any communication at least that they directed, certainly is not a matter to which they can claim privilege; whereas the United States might feel that it could not disclose the same letter received from the union.

Now, we feel that this does have a very direct connection here as to the relationship between the unions and the plaintiff in this case, between the plaintiffs themselves and between the plaintiff and the defendant in this action. And for this reason, we feel that the material is relevant and should be produced.

Mr. Milledge: He hasn't said anything yet, Judge, that goes to any materiality or relevance to what issue in the case might this have the remotest bearing. It's really just a fishing expedition to see if he can come up with something he hopes might—I don't know what he really hopes to find but there has been absolutely no showing of any materiality to any issue in this case.

The Court: Then he asks, down here in the last:

"Correspondence, memoranda, minutes of meetings, resolutions, motions and any other documents or records concerning or relating to the notices of July 31, 1963 or September 24, 1963 given pursuant to Section 6 of the Railway Labor Act by the Florida East Coast Railway Company or concerning or relating to the document entitled 'Conditions of Employment' dated September 1, 1963."

372 Mr. Milledge: Well, that particular category, it's clearly too broad. What that would involve is the union meetings on how to respond to the notice and their own deliberations as to what action they should take, whether they should—there has been no suggestion what

materiality that would have. This is a group of people that have to decide how they respond to the railroad, and it would be like asking for the deliberations of Mr. Wyckoff in his personnel office as to what policies are involved.

There may be some more limited purpose but, in that as submitted there, it's—

The Court: Do you have any further comment on this?

Mr. Devaney: Your Honor, we aren't—we don't want to go into the end details in any sense that their decisions and deliberations of the unions as to what action they should take with regard to these notices, but there certainly is materiality here to the fact that these notices were received, the fact that various action was subsequently taken—and I don't refer now to the deliberations
373 as to reasons, what they should do; but these became crystalized at some point in various correspondence and decisions which they made. We believe this has a direct materiality to this case.

One of the contentions that has run through all of these cases has been the question of intent. And I think that this has a direct bearing on what the union understood, what they knew from the receipt of various notices, and what this really resulted in as far as a position; I think we are entitled to it. I don't have any interest in having the debates that went on in the meetings, the comments of the members in the meetings, beyond showing what their action was and to show this intent of the meetings.

In the BRT case, one of the contentions which the union made was that a certain—that the notice be given, had been superseded in some manner and yet they continued to bargain. They continued to bargain after all the activity that they complained of that had this effect had occurred.

Now, we feel that for the same reason that the only way you can show that, if a person is coming in and saying that he didn't know about something or it
374 didn't have this effect, we feel that this very material to show that they didn't have the slightest doubt that

it had precisely the effect that the carrier believed that it had. So for this reason, we think there is materiality, that the material should be produced.

The Court: Anything further?

Mr. Milledge: No, Your Honor.

The Court: Well, with respect then to the several subpoenas duces tecum, Category 1 has already been complied with.

The Motion to Quash is granted as to Category 3, Category 4, and Category 5.

As to Category 2, which deals with the expulsion and disciplinary action during the strike time, if it can be developed, if it is developed, when you have the individual witness who has been subpoenaed here on the stand, that there was some action, I would not limit your right to inquire about the disciplinary action and to call on the witness for relevant documents in connection with
375 it. So, to that limited extent, the Motion to Quash as to Category 2 is denied and you may go forward to that extent with that.

Now, do we have anything else that we should dispose of before you go into your factual case, or are you ready to go on and make your case?

Mr. Devaney: No. We, of course, filed yesterday, Your Honor, the Motion to Dismiss that we, of course, think—

The Court: Well, there again, at the time that the Government rests its case may be an appropriate time to talk about dismissing. As I indicated yesterday, I consider it better to carry it with the case, and I'll carry it to the close of your case and the close of the Government's rebuttal.

Mr. Devaney: I understand.

The Court: And I'll take it up at that time.

Mr. Devaney: We have nothing further in a preliminary way.

The Court: All right. Maybe it would be suitable to

376 take a recess at this time and let you sort of make your plans on how you want to proceed.

Mr. Devaney: We would very much appreciate it.

The Court: Will an hour be long enough for a noon recess, or would you like a little longer?

Mr. Devaney: Well, it's now 12—

The Court: It's about 12:40. I was going to suggest we reconvene at 1:45. I can make it 2:00 if you think you need that much time.

Mr. Devaney: If it would be 2:00, it might be helpful, Your Honor.

The Court: 2:00 o'clock then, Gentlemen. Take an adjournment until 2:00 o'clock.

You gentlemen may leave your papers in here. I'll see that the room is locked up. Nobody will disturb them.

Thereupon at 12:45 o'clock p.m., on Wednesday, May 27, 1964, Court adjourned to be reconvened at 2:00 o'clock p.m., on the same day.

377 (At 2:00 o'clock p.m., on Wednesday, May 27, 1964, pursuant to adjournment of the preceding session, the Court reconvened and the following further proceedings were had):

Mr. Devaney: The first witness I would like to call is Mr. C. A. DuPont.

C. A. DuPont.

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, please.
A. C. A. DuPont.

Q. And are you affiliated with one of the labor organizations? A. I am.

Q. And which one? A. Electrical Workers.

Q. IBEW? A. IBEW.

Q. And what is your position with the IBEW? A. I am President and General Chairman of Local 888.

Q. And that is one of the locals representing employees of the Florida East Coast? A. That's correct.

The Court: 188, Mr. DuPont?

The Witness: Pardon?

The Court: 188?

The Witness: 888.

The Court: 888, thank you. Where is that, St. Augustine?

The Witness: The Local Charter is in Miami.

The Court: At Hialeah; Miami?

The Witness: Miami.

The Court: All right, thank you.

And you represent the electrical employees at Miami, Jacksonville, New Smyrna, St. Augustine?

The Witness: On the Florida East Coast System.

379 The Court: The whole System?

The Witness: Yes, sir.

By Mr. Devaney:

Q. Now, Mr. DuPont, this is the document that I was furnished yesterday, which is your Constitution; is that correct? A. Yes, sir, that is our International Constitution.

Q. Is that a copy which we could have marked and introduced as an exhibit or do you want me to read the relevant provisions from this? A. Well, I would rather you read the relevant portions for the record. That's the only copy I have at hand.

Q. All right, fine.

The Court: Well, just for the purpose of this hearing and to be returned to Mr. DuPont at the close of the hearing, suppose we mark this Defendant's Exhibit A and let either side—

Mr. Devaney: Refer to it?

The Court: —refer to it and read from it. I'll see
380 that the Clerk is directed to return it to Mr. DuPont
after we finish the hearing. I think we may as well
have it here where either side can use it.

The Clerk: A in evidence.

(The referenced document was received and filed in evidence as Defendants' Exhibit A.)

Mr. Devaney: Will you mark this B?

The Clerk: Are you going to offer it right away?

Mr. Devaney: Yes.

The Clerk: See if they have any objection.

By Mr. Devaney:

Q. Mr. DuPont, I hand you this document and ask you if this is a letter which you wrote, of February 8, 1963, or a copy of the letter? That is not the original. A. Yes, sir. I would say that that is a copy of it.

Mr. Milledge: The Intervenors have no objection.

The Court: Mark it in evidence.

381 (The referenced document was received and filed in evidence as Defendants' Exhibit B.)

By Mr. Devaney: :

Q. Now, Mr. DuPont, this letter which has been marked for identification as Defendants' Exhibit B states that the employees that you represent have withdrawn from service and are not subject to call for service.

Now, could you tell us what that means? Does that mean what it appears to mean, that we weren't supposed to call them for work? Is that what that means? I just want to make sure we understand precisely what the words that you have used here intended to mean. A. Well, in this instance, it meant that the man had been—if I recall, if my memory serves me right, that a job had been awarded to an individual and he was notified to report for duty.

Q. It had been awarded, or a bid of the job had been posted for bid? A. The job had been posted for bid.

Q. Yes, sir. A. And it's not clear in my memory but the thing that I was trying to point out here is that the man was not subject to call, because we were on a legal strike.

Q. Now, were you saying, Mr. DuPont, that the
382 company was not obligated to post these jobs for bid? A. I'm trying to get your line there. This is something that occurred over a year ago and I don't—would you ask me the question again, please?

Mr. Devaney: Would the Clerk read the last question back?

The Reporter: "Now, were you saying, Mr. DuPont, that the company was not obligated to post these jobs for bid?"

The Witness: No, sir. I was not saying that.

By Mr. Devaney:

Q. Well, that's what I was trying to understand, what precisely were you saying? A. (no response)

Q. You say they were not subject to call. We had posted jobs and you say that they were not subject to call. And I'm merely trying to understand precisely what you intended by your statement that they were not subject to call? A. Without having reference to the bulletin and an opportunity to go over this thing, I can't tell you what I did exactly have in mind at that time.

Q. Now, if we may digress one moment: Let me
383 hand you the Constitution, which has been marked for identification as Defendants' Exhibit A. And I have the notation of the sections over here.

Will you look at page 78. Do you have that? A. Yes, sir.

Q. And this is Article—that would be 27, Section 2, subsection 9. A. Yes, sir.

Q. Now, this reads that—I'm going to quote it: "Working in the interest of any organization or cause which is detrimental to or opposed to the IBEW."

A. That's correct.

Q. Now, in this Article, is this one of the grounds, Mr. DuPont, that a member would be subject to expulsion if he engaged in this conduct? A. Yes, sir.

Q. Is working for an employer who is engaged in—on which the IBEW is engaged in a legal strike considered a violation of that subsection? A. Yes, sir.

Q. Now, turning to subsection 20, on page 79— A. Yes, sir,

Q. That provides:

384 “Working for any individual or company declared in difficulty with a local union or the IBEW in accordance with this Constitution.”

A. Yes, sir.

Q. Now, would that “declared in difficulty”, would that encompass a strike authorized by the IBEW for your local union? A. Yes, sir, it would.

Q. Now, is it correct then, Mr. DuPont, that any member who worked during the period of the strike would be guilty of one or more violations of the Constitution and would be subject to expulsion by the union? A. That’s right.

Q. Now, if a member is subject to this expulsion from the union, is a person who has not been a member of your union who is now employed by the Florida East Coast eligible for membership in your union? A. Yes, sir.

Q. Under what provision? A. He can make application. Anyone can make application for membership.

Q. I understand. But would he be accepted for membership in view of the limitations which say that if he
385 were a member he would be expelled for having worked for the employer during the period of an authorized strike? A. Well, I can answer that by saying that he would have to be voted into the organization and the will of the membership would have to govern that.

Q. Have any employees who have worked for the Florida East Coast during the period of the strike been admitted to membership in the IBEW? A. No, sir.

Q. Now, Mr. DuPont, I have not written this down but I am going to read from Article 22, Section 4, which deals with the obligation. It says:

"Each applicant admitted shall in the presence of members of the IBEW read and sign the following obligation."

There is a place for I, and the name:

"in the presence of members of the International Brotherhood of Electrical Workers promise and agree to conform to and abide by the Constitution and Laws of the IBEW and its local unions. I will further the purposes for which

the IBEW is institution. I will bear true allegiance
386 to it and will not sacrifice its interests in any manner."

Now, isn't it true, Mr. DuPont, that when it says "conform to and abide by the Constitution", that it would mean that this obligation of membership would immediately include the obligation that we referred to earlier in Article 27, Section 2, subsections 9 and 20, with regard to a member who works for an employer during the period of an authorized strike?

I don't mean to jump on you. A. Can you break that down a little bit?

Q. Yes, I can.

Earlier, we were talking about a person who is already a member? A. Yes, sir.

Q. And I asked you if that person worked for an employer with respect to whom the IBEW or the local union were engaged in an authorized strike, would that person then violate the Constitution and be subject to expulsion?

A. Yes, sir.

Q. You said yes? A. That's right.

Q. And that was Article 27 of your Constitution? A. Yes, sir.

Q. Now, the obligation of a member, when a man
387 becomes a member, he says, "I will abide and be subject to the provisions of the Constitution"? A. That's correct.

Q. So that I'm asking you, that since this obligation requires that a man who wants to be a member has to say that, "I will do this"? A. Uh-huh.

Q. Would it not follow that a person who is now working for Florida East Coast could not while continuing to work for Florida East Coast become a member of the IBEW, as long as this authorized strike is in continuance?

A. Well, that's a good line of reasoning.

Q. Well, is it correct? Is it a correct line of reasoning?

A. I would say that a person that made application, if he was voted into the organization, would take that obligation. He would, in turn, be subject to the terms of that Constitution and be guilty and be subject to discipline. That's a long line of reasoning but—

Q. But to put it another way: If a person were taking this obligation, he could not in effect take the obligation while he is working for an employer against whom the IBEW is on strike? A. Not if he's a man, he
388 couldn't take it. I know some people that could, I think.

Q. All right. Now, the provision we read earlier was Article 27.

Isn't it true, Mr. DuPont, that Article 17, Section 12, appearing on page 48, has a similar provision that no local union shall allow any member to work for any employer declared in difficulty? A. Yes, sir, it's Section 12.

Q. And that would—difficulty would include an employer against whom the local union or the IBEW was engaged in an authorized strike? A. Correct.

Mr. Devaney: And I'll not read these, Your Honor, but I will note for the record that Article 9, Sections 4 and 6, are provisions that relate to the trial of any local union or member charged with injuring the interests of the IBEW, and so forth.

And that Section 6 is to suspend or revoke the charter of any local union—and I don't know what the IS—International Secretary?

The Witness: Secretary.

389 Mr. Devaney: Reject the per capita tax from any local union that fails or refuses to observe the laws and rules of the IBEW.

By Mr. Devaney:

Q. Now, Mr. DuPont, do you recall that proceedings were brought against an individual by the name of Elliott? A. Yes, sir.

Q. Do you have any of the documents relating to Mr. Elliott here? He was expelled from the union or was fined and expelled, isn't that correct? A. That's correct.

Mr. Shapiro: Your Honor, I would like to make an objection.

I don't see what relevance or materiality this entire line of questioning has with the issues in the law suit. The fact that the labor organization is on strike is established. I assume that the carrier is not contending that, every time a labor organization is on strike, that it's obliged to accept—it's obliged to bring members of the union back to work while the strike is in progress.

I'm just unable to see what the relevance and materiality of the line is.

390 Mr. Devaney: Your Honor, the relevance and materiality is this: One entire count of this complaint deals with union shop agreements that existed between the Florida East Coast and the various unions.

Now, a part of the consideration is whether or not, completely and entirely apart from any action by the Florida East Coast, the organizations have not themselves, at least during the continuance of the strike, have not suspended or rendered unenforceable their union shop agreements as to the people who are now working.

Now, as to the question of the bargaining, this is—it is true that this is also present as to whether or not the agreement was terminated by the Section 6 notice, but if the agreement has become null and void and unenforceable,

that occurs by operation of law apart from anything that the carrier may have done in this case.

It also goes to whether or not if any order were to be issued, as to the nature and the extent of the order requiring immediate compliance with the terms of the union shop agreement. We feel that this is very material to what has occurred. We certainly agree with Mr. Shapiro. We
 491 aren't complaining. We have no disagreement with the right of the union to withdraw its members on an authorized strike. We are not saying that they are violating the law in any respect by not coming back to work, but we do say that the terms, the enforcement, the effect to be given to their union security agreements during the period of this strike is a matter which must be determined and we have a right to investigate and to find out what has occurred to those agreements during the period of this strike.

Mr. Shapiro: Your Honor, we believe that this is not either relevant or material.

First, insofar as a union shop count is included in the complaint, it is addressed to the fact that the carrier, as a result of its Section 6 notice of July 31, 1963, has purported to abrogate the agreement, to cancel it.

Now, the argument is made that the complaint also—that the strike has rendered the union shop agreement unenforceable. Whether it's enforceable or not is not the basic issue involved in the complaint. It's whether it has been cancelled prospectively, and that is what we are trying to remedy here.

392 The argument that the agreement becomes by virtue of the strike null and void and unenforceable, I think is a completely untenable contention since it would mean that in every strike in which somebody had a union shop agreement, by the very act of striking, they would nullify the union shop agreement.

Now, that is, I think, on its face an absurd contention.

Finally, the union shop agreement exists, Your Honor,

by virtue of the operation of Section 2, Eleventh of the Railway Labor Act. And Section 2, Eleventh of the Act expressly provides that if members—I'm sorry:

"If employees have a union shop agreement"—

and I'm now reading from Section 2, Eleventh, (a) and the proviso therefrom:

"that no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership is denied
393 or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments, not including fines and penalties, uniformly required as a condition of acquiring or retaining membership."

Now, in the light of this provision of the law, I think it clear, that if the striking union rejects the application of a replacement worker because he is not on strike—

The Court: This isn't a question of rejecting an application. What he is asking him about is disciplining by expulsion a member who goes to work.

Mr. Shapiro: Well, I was referring to the entire line of questioning we've had here, Your Honor, and my contention is that, insofar as this union shop agreement is concerned, this line of questioning which has been developed here is just not relevant to the issues on the union shop count of the complaint.

2, Eleventh of the Statute expressly takes care of the situation where employees are denied membership in a striking union which has a union shop agreement.
394 I don't think it can follow as a matter of law that every strike by an organization with a union shop agreement would automatically result in the cancellation or nullification of the agreement. And our complaint is concerned primarily with—in fact, it is solely with the attempt of the carrier to abrogate this union shop agree-

ment, to cancel it, as they have purported to do. So we don't think this is involved in our law suit.

The Court: I'm going to—I think I must permit Mr. Devaney to put this in the record, either in the form of a proffer which I exclude or in some way to put it in here; and it may as well go on in and be considered for whatever legal weight we finally give it.

I'm not prepared to say in advance of legal argument whether I will restrict the issues as narrowly as you would seek to restrict them. I think we may as well have this in the record for whatever weight it may later be determined to have, and that would apply—I suppose that Mr. Devaney expects to call other chairmen or other local chairmen or president or representatives of these various crafts that he has subpoenaed here and he may want to show
395 some others. This, we will say, applies to all those without repeating the argument or the objection.

Mr. Shapiro: Thank you, Your Honor.

The Court: Did the question—You gave the name of a man?

Mr. Devaney: Yes, sir.

The Court: Whether or not he had been disciplined. I think that's when the—

Mr. Devaney: I'm not certain whether it's J. O. or J. V. Elliott.

The Court: Ellis or Elliott?

Mr. Devaney: Elliott, E-l-l-i-o-t-t.

By Mr. Devaney:

Q. Do you have any of the documents relating to this case with you, Mr. DuPont? A. Yes, sir.

Q. Would you mind bringing them to the stand, please.

A. (Witness left the stand, obtained instruments, and returned to the stand.)

396 Q. Now, do you have those documents, Mr. DuPont? A. Yes, sir.

Q. May I see them, please. A. (Producing instruments)

Q. Thank you. Are these your only copies, Mr. DuPont?

A. Yes, sir, they are.

Q. Anything here—would you have any objection if there is—I haven't looked at them—if we simply had them marked and then we will withdraw them and have copies made and return any originals that we introduce? A. It's all right with me.

Q. Now, the first document is the charge; is that correct?

A. Yes, sir, that's the original.

Q. And the second letter here, this is the minutes—represents the minutes of your meeting, does it? A. Yes, sir, that was a copy of the minutes that the Recording Secretary sent me. Of course, he kept the original copy, the original of that.

Q. Then this is the letter to Mr. Elliott by Mr. Johnson?

A. Yes, sir.

397 Mr. Devaney: Now, I have no objection to putting it in but I'm not going to do so at the moment since I believe that everything that's material is in the minutes of this meeting.

Is that right? Do you want this put in Mr. DuPont? I will be glad to if you would like to have it marked.

The Court: Maybe counsel should answer that question rather than the witness.

Mr. Milledge: Just put the whole thing in. It's the complete record pertaining to the one item.

The Clerk: Defendants' Exhibit C.

(Thereupon, the referenced material was received and filed in evidence as Defendants' Exhibit C.)

The Court: This is received subject to objection.

Mr. Milledge: Your Honor, just for the Intervenor generally, we don't feel this is material. We argued that on the Motion to Produce.

398 The Court: You have the same objection, Mr. Shapiro made.

Mr. Milledge: Which is continuing?

The Court: Yes, sir.

By Mr. Devaney:

Q. Now, Mr. DuPont, I hand you this and ask if you are familiar with that document?

The Court: Is that a document already marked here or is that something news?

Mr. Devaney: No, it is not. It has not been marked, Your Honor.

The Witness: Yes, sir, I have read this.

By Mr. Devaney:

Q. You have read it? A. Yes, sir; not recently, but I have read it.

Q. All right.

Mr. Devaney: Have both of you seen it?

Mr. Shapiro: Yes.

399 By Mr Devaney:

Q. Mr. DuPont, while they are looking at that document, let's go back to the one marked Defendants' Exhibit C, which is the list of the various documents making up the record of Elliott which you handed me a few minutes ago.

A. Yes, sir.

Q. Now, the minutes of the meeting provide in part: That the meeting was called to order at 8:00 p.m.; charges read as filed against J. O. Elliott, who has crossed picket line at Bowden Yards to return to work for the strike-bound F.E.C. Railway; these charges filed April 17, 1963, Article 27, Section 2, Paragraphs 9 and 20 of the IBoFEW Constitution and Local By-Laws being violated.

Now, is there a—did you give me a local by-law? A. Yes, sir.

Q. And this is one of the documents that we have? A. Yes, sir, it is marked on the front sheet, Local 888, IBEW. It's on typewritten paper. It's not—

Q. Oh, it's typewritten? A. Yes, sir.

Q. I'm sorry. I find it now. That was one that had slipped by me. This is it? (Indicating) A. Yes, sir.

400 Mr. Devaney: Now, we marked the first one as Defendants' A. Why don't we make the Local as Defendants' A1?

The Court: This is the ByLaws?

Mr. Devaney: This is the Local Union's By-Laws, yes, Your Honor.

The Court: All right, it's A1.

(Thereupon, the referenced document was received and filed in evidence as Defendants' Exhibit A1.)

The Court: The same conditions about reading from it by either side and its withdrawal and return to Mr. DuPont at the end of the hearing, I suppose better be in effect.

The Witness: Yes, sir.

The Court: The same as they were for the Constitution.

Mr. Devaney: Mr. Milledge?

Mr. Milledge: No, sir.

By Mr. Devaney:

401 Q. This is one that I hadn't looked at.

Can you tell us offhand the provision of the Local By-Laws that would be involved, or do you remember offhand? A. I don't remember offhand, sir. It would be a similar rule to the International Constitution, because nothing therein contained can contradict the International Constitution. It has to conform with it. That's just recently been revised and it had to go back and forth, one thing and another; I couldn't tell you. It's not in very good shape, let's put it that way, but when I was called on to produce this, I had to produce what I had.

Q. But there is somewhere, and if I go through it I'll specifically call it to your attention, that you are referring or the Secretary was referring here to a similar provision in your Local By-Laws to those that we read from the International, relating to working during the period of an authorized strike? A. Yes, sir.

Q. Now, this says that he did not—

“Brother Elliott was notified”—

and did not report for hearing. It goes on to say:

“Discussions were had on charges as filed * * *; the decision of the Trial Board was guilty as charged, penalty to be imposed for above violations is expulsion from Local #888 IBofEW.”

That's correct? A. That's correct.

Q. Now, was there a money penalty imposed on Mr. Elliott, or was expulsion the only penalty? A. That was the only penalty.

Q. Now, have there been charges against other members of the IBEW who have worked for the Florida East Coast during the period of the strike? A. No, sir.

Q. This is the only one? A. Yes, sir.

Mr. Devaney: You Honor, I move—I think most of them have been admitted but, if I've overlooked any, I move that Defendants' Exhibits A, A1, B and C be admitted into evidence.

The Court: They are in.

The Clerk: They're in.

Mr. Devaney: Fine.

403 The Court: They're in.

Mr. Devaney: I though I was correct but I—

The Court: The National Constitution and the Local By-Laws are to be returned. The others, I take it—

Mr. Devaney: Yes.

The Court: Well, I think the same thing about the disciplinary report and—

The Witness: Well, I have a copy of this.

Mr. Devaney: We will withdraw that and copy it.

The Court: You will substitute a copy of that?

Mr. Devaney: Yes, I shall.

No further questions of this witness, Your Honor.

Mr. Milledge: You can come down.

(Witness excused)

404 Mr. Milledge: Judge, if it would speed up the proceedings—

Mr. Devaney: I'm sorry—

The Court: Just a minute, Mr. DuPont.

Mr. Devaney: I'm sorry. We forgot this that Mr. Milledge still had. I did not want to mark this as D.

The Court: What is that?

The Clerk: Strike call and instructions pertaining to conduct of strike, dated January 16, 1963.

The Court: Is that identified as a document emanating from this union that he represents?

Mr. Devaney: Well, Mr. DuPont—

The Court: You haven't asked him about it?

Mr. Devaney: Yes.

405 The Court: Mark it D for identification and ask him.

(The referenced material was marked Defendants' Identification Exhibit D.)

C. A. DuPont

resumed the stand and further testified as follows:

Further Direct Examination

By Mr. Devaney:

Q. Now, you've indicated that you were familiar with this, did you not, Mr. DuPont? A. I said I've read it but it has been quite awhile back.

Q. And your name appears as one of the signators— A. Yes, sir.

Q. —to this, on page 6.

Now, were you present when the other individuals signed this? It might save a little time if you were. A. No, sir.

Q. But this purports to—this is a document entitled "Strike Call and Instructions Pertaining to Conduct of Strike". It bears at the top "System Federation No. 69".

A. Yes, sir..

Q. Now, am I correct that System Federation No. 69 consists of these organizations? Do you want to
406 read it? (Tendering instrument to the witness) A. No, sir, that's it.

Q. Are those also referred to on occasion as shop crafts?
A. That's the shop crafts group, yes, sir.

Q. And they are the six unions listed here; IAM, Boilermakers, Sheetmetal workers, IBEW, Carmen, Brotherhood of Firemen, Oilers and Helpers.

Now, this was distributed, was it Mr. DuPont, by all of the members of System Federation 69? A. Yes, sir.

Q. And on page 3 of that, this provides that:
"No employes of the Florida East Coast Railway represented by our organizations will perform any service after the hour set to strike."

A. That's correct.

Q. And on page 4, it says; in part, the last sentence says:
"No employee will return to work until the strike is officially terminated."

A. That's correct.

Q. "Employes of classes or crafts other than the
407 crafts on strike are requested to refrain from crossing picket lines * * *".

A. That's right. You didn't finish reading that line.

Q. No, I didn't.
"except to the extent herein indicated."

Now, No. 9 says, in the last sentence:
"Every employe, member and non-member, is expected to obey the strike order which has been issued and any person remaining in the service after the strike is on will be designated as a strikebreaker."

A. Yes, sir.

Q. Is a strikebreaker considered a fairly unpopular person?

Mr. Milledge: Objection, Your Honor.

The Court: Objection sustained.

Mr. Milledge: That's obvious.

The Witness: You won't let me answer?

By Mr. Devaney:

408 Q. Now, the next paragraph refers to:

"Clearly defined cases of disloyalty or indifference on the part of any person involved in the strike * * *".

Now, is disloyalty and indifference, would that encompass the action of a person going to work for this employer against whom the authorized strike was in progress? A. I would say it definitely would be disloyal.

Q. Now, this paragraph says that:

"It is understood that similar instructions are being issued by the duly authorized representatives of the other cooperating organizations."

Then they are listed.

Now, you are listed here but there are others that are not included in System Federation 69? A. That's right.

Q. Now, when you say:

"It is understood that similar instructions are being issued"

do you know whether such instructions were in fact issued, similar to what we have gone over as distributed by System

Federation 69? A. I can't swear to it that there
409 were or were not at this time.

Q. You don't recall having seen any copies of any such documents? A. I couldn't say at this time, no, sir. It has been too long ago.

Mr. Devaney: I also move that this, if we have not officially done so, be received in evidence as Defendant's Exhibit D.

Mr. Milledge: I believe, Your Honor, that Mr. Devaney's handwriting ought to be taken off the exhibit. It's kind of marked up.

The Court: Well, identify, if you will, Mr. Devaney, what markings you put on it and I'll just disregard those. Where is that?

Mr. Devaney: Mr. Devaney didn't put any of those markings on, Your Honor, but somebody did and I, if—

The Court: The underscoring is not a part of the document?

Mr. Devaney: The underscoring is not a part of
410 the original document.

The Court: I've been calling you Devaney through all these other cases: Do you call it Devaney?

Mr. Devaney: Yes, Your Honor.

The Court: Senator Butler one time called you "Devah-ney". Excuse me, I don't like to mispronounce anybody's name and I'll try to remember that.

Mr. Devaney: I have no further questions of the witness, Your Honor.

Mr. Shapiro: No questions, Your Honor.

Mr. Milledge: None.

The Court: Come down.

(Witness excused)

(Defendants' Identification Exhibit D was received and filed in evidence.)

Mr. Milledge: If it would help, we will stipulate
411 that the Constitutions of the other cooperating non-operating unions have similar provisions to the one just—the IBEW, and that their General Chairman would testify substantially the same as Mr. DuPont has just testified.

The Court: Well, this is perhaps—as you know, maybe you don't know this—entering a stipulation about any disciplinary action and about a similar notice to this Exhibit D—

Mr. Milledge: This last one? I suppose it went out to all the cooperating—

(Mr. Milledge conferring with witnesses)

The Court: If they were cooperating, I assume they cooperated by sending out the same notice to employees?

Mr. Milledge: It went to—five of them are apparently the authors of that, this D that you just had. Maybe it didn't go out to the other six. I say five of them in the System Federation, five or six.

The Court: Does that help you get on with your case?

412 Mr. Devaney: Well, I think with this, Your Honor, that we can speed it up. There are some about whom we do have some indication that disciplinary action was taken. We do have some indication that at least one other organization outside the shop crafts issued the same sort of instruction we've refererd to, but I believe that this stipulation may speed it up; and I will simply note for the record the provisions, as far as I'm familiar with them, without reading them or going into detail about them.

The Court: At least you don't need to call Carmen, Welders or some of the others in the System Federation?

Mr. Devaney: Well, one that has some disciplinary matters that we are vaguely aware of is the IAM, a member of the System Federation. So we can proceed with Mr. McDougall, if you care to, as the next individual.

The Court: All right, sir.

413

R. W. McDougall.

having been produced and first duly sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination

By Mr. Devaney:

Q. Mr. McDougall, you have heard the—

The Court: Let's get his name in.

Mr. Devaney: I'm sorry.

By Mr. Devaney:

Q. Would you state your name for the record, please,

A. R. W. McDougall.

Q. Would you state your position with the IAM, please,
A. President and General Chairman of District 16.

Q. Of the International Association of Machinists? A.
A. International Association of Machinists, yes.

Q. Now, you have heard the statement made by Mr. Milledge. You do not disagree with that statement in any way, do you, that you have similar provisions to those which we have gone over in the IBEW contract relating to members who worked during the course of the strike?

A. Yes, they are similar.

414 Mr. Devaney: Now, in case anybody else does want to refer to it, may we mark this as E?

(Thereupon, the referenced material was marked Defendants' Identification Exhibit E.)

Mr. Devaney: This will be returned to you as soon as—at the close of the hearing.

The Court: Mark it the same as we marked A.

The Clerk: Yes, sir.

(Thereupon, Defendants' Identification Exhibit E was received and filed in evidence.)

By Mr. Devaney:

Q. I have noticed that the Sections that appear to be relevant in this connection include at least Article L, Section 3, on page 97. A. Section 3-

Q. Section 3. A. Improper conduct of a member.

The Court: Keep your voice up, please, Mr. McDougall.

The Witness: Yes, sir.

415 By Mr. Devaney:

Q. It's line 23 through 25. (Indicating) A. (Nodding head in the affirmative)

Q. That is one of the Sections we were referring to, isn't it? A. Yes.

Q. Now, Mr. McDougall, do you—are you familiar with a case involving M. F. N. Neal? A. Yes, I am.

The Court: Neal?

Mr. Devaney: N-e-a-l.

The Court: Thank you.

By Mr. Devaney:

Q. Was Mr. Neal employed by the Florida East Coast?

A. Yes, he was.

Q. And was he disciplined in any way by IBEW—I'm sorry, by the IAM? A. Yes, he certainly was.

Q. And in what manner? A. He was brought to trial under Article L of the Constitution and was sum-
416 marily found guilty and subjected to fine.

Q. Would the amount of that fine be a thousand dollars? A. Yes, it was.

Q. Do you have any of the records, the documents relating to this matter with you, Mr. McDougall? A. No, I do not. The Local Lodge transmitted the documents to the Grand Lodge in Washington, so they have the minutes of the trial and everything pertaining to it there.

The Court: What, there's an appeal pending?

The Witness: No, sir. Before the penalty can be levied, the Grand Lodge reviews every case.

The Court: They review it whether it's appealed or not; is that right?

The Witness: Yes, sir, that's right.

By Mr. Devaney:

Q. Now, in addition to that, was any further action taken by way of discipline against anyone who worked during the period of the strike? A. Yes. We had another case involving Mr. T. S. Sigmon.

417 Q. T. S. Sigmon? A. Sigmon, S-i-g-m-o-n.

Q. And was he disciplined in some way? A. Yes, he was disciplined in the identical way that Mr. Neal was and received the same penalty.

Q. And he also was a member who worked for F.E.C. during the strike? A. Yes.

Q. Now, what about a Mr. V. G. Swindull? I may not be pronouncing it correctly. I had his name as S-w-i-n-d-u-l-l.
A. That's correct.

Q. Is that the one you just mentioned? A. No, sir. Mr. Swindull was a third party. However, at the time of the strike, he had withdrawn from active membership and held an honorary withdrawal card.

Q. I see. And was any action taken with respect to this withdrawal card? A. Yes, there was; as a matter of fact, it was revoked.

Q. And did that have the effect of terminating his membership in the union? A. Not to the extent that he could not make application and become an active member, no.

Q. You mean this would permit him—I mean, the fact that his withdrawal was terminated meant that he
418 could apply for membership over again? A. Yes, he could. He wasn't expelled from the union by that action.

Q. These people who were expelled, were they eligible to reapply? A. They were not expelled, Mr. Devaney.

The Court: They were fined.

The Witness: They were just fined.

By Mr. Devaney:

Q. Just fined the thousand dollars? A. Yes, sir.

Q. But Mr. Swindull, what did you mean that he was no longer affiliated? He had to make this application to be readmitted before he was a member again? A. That's correct. In withdrawing his honorary withdrawal card, it naturally made his membership in status quo more or less.

Q. Now, were there an other individuals with respect to whom the union took disciplinary action because of their working during the period of the strike? A. No, sir. As far as the IAM, just those three were involved.

419 Mr. Devaney: I don't know whether we moved—I now move that Defendants' Exhibit E be received in evidence, Your Honor.

The Court: I think I've already said that it could come in under the same terms as A came in.

Mr. Devaney: Yes, sir; fine.

The Court: To be returned to Mr. McDougall at the end of the hearing, but I want it available here for each side to read pertinent provisions in if they want to.

Mr. Devaney: I have no further questions of this witness, Your Honor.

Mr. Shapiro: No questions.

Mr. Milledge: No questions.

The Court: Come down, Mr. McDougall.

(Witness excused)

420

W. F. Howard.

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, please.

A. W. F. Howard.

Q. And are you an official of one of the labor organizations? A. I am.

Q. Which one, Mr. Howard? A. Brotherhood of Railway and Steamship Clerks.

Q. What is your position with that organization? A. General Chairman.

The Court: What is the Local involved? What is the designation of the Local?

The Witness: We have no—I'm the General Chairman of the System Board of Adjustment.

The Court: Of the System, the F.E.C. System?

The Witness: That's right.

421 The Court: In other words, you represent all clerks on the F.E.C. System?

The Witness: Right.

The Court: You don't call it a Local number; you call it F.E.C. System. Is that right?

The witness: F.E.C. System Board.

By Mr. Devaney:

Q. Now, these are the documents that I was furnished; being Constitution and By-Laws of the International Union and the By-Laws of the Florida East Coast System Board of Adjustment. A. I also gave you another copy of the By-Laws that were effective in May of 1963.

Q. Another copy of these? A. Yes. This was effective June 1st, 1959.

Q. Oh, I see. A. You will have to get the effective date from the inside.

Q. All right, let me get the other. A. There's another Constitution.

422 Q. Now, is this the one? (Indicating) A. That's the current one.

Q. That's the current one, and the other one was the earlier? A. Effective June 1, 1959 through June 30, 1963.

Q. Fine.

Mr. Devaney: Would you mark these, please?

The Clerk: You want them separately?

Mr. Devaney: I think you can mark these F, 1, 2 and 3.

The Clerk: All right.

(. . . Thereupon the referenced material was received and filed in evidence as Defendant's Exhibits F, F1 and F2.)

By Mr. Devaney:

Q. Now, are you familiar with this document, Mr. Howard? (Indicating) A. Yes, I am.

Mr. Devaney: Would you mark this then as G?

(. . . Thereupon, the referenced material was received and filed in evidence as Defendant's Exhibit G.)

423 By Mr. Devaney:

Q. Now, you heard the stipulation statement proposed, made by Mr. Milledge earlier.

Do you have any disagreement with that, Mr. Howard, that there are provisions in your various Constitutions and By-Laws similar to those that we discussed at some length with respect to the IBEW? A. Except to the extent that I think our Constitution and By-Laws do not call for an obligation.

Q. Now, to what are you—you mean what I referred to on the obligation of a member? A. Right.

Q. Now, I don't—to make certain that I understand you: You say that when a person becomes a member of the Clerks—Railway and Steamship Clerks, he doesn't take such an obligation of membership or that it's different than the IBEW? A. We haven't required an obligation since the effective date of the union shop agreement.

Q. And that was some time in '56? A. '53, I believe.

Q. '53. Now, under your Constitution, Mr. Howard, is an employee working for the Florida East Coast during the period of the strike anymore eligible for membership than the individual was applying for membership in the IBEW? A. Well, the eligibility for membership is spelled out in the Constitution, and that you have before you.

I think, along about page 78 of the former one, the former Constitution—

Q. Yes, I have it. This is the Section dealing with membership and Article 4, Section 1—now, this is the newest one, isn't it, newest agreement? A. No.

Q. That's not the one you had in mind? A. No. (Indicating)

Q. I see. You were referring to Article 2 of page 74 now? A. Right.

Q. Now, Section 2 of that, Mr. Howard, says that applications for membership, reinstatement to membership or reinstatement upon deposit of a withdrawal card, shall

be made in writing upon a form furnished for that purpose. The application must be signed and recommended by a member in good standing. A. That's correct.

Q. Now, Section 3(a) says:

"Members shall not propose for membership persons whom they do not know to be favorable to the principles of the Brotherhood."

Now, I would take that to mean that, if a person were working during the period of an authorized strike against an employer, that the Clerks had called, that he would not be considered a person favorable to the principles of the Brotherhood? A. That's a prerogative of the Local Lodge. If you will read further there where they vote on them.

Q. I understand. But Section 2 says that an application must be signed by a member in good standing. And Section 3 says that members shall not propose for membership any person whom they do not know to be favorable to the principles of the Brotherhood.

Now, where in there does this—I mean, this seems like a flat limitation on—A. If someone proposes them, then he would be subject to that Section. (Indicating)

Q. I realize that, Mr. Howard. What I'm asking is that Section 2 says that the membership has to be signed by the applicant and recommended by a member. And Section 3 says that a member shall not propose for membership anyone whom they do not know to be favorable.

Now, a person wouldn't be favorable to the principles of the Brotherhood if he were working for an employer against whom the Brotherhood was engaged in an authorized strike; isn't that correct? A. I would say that he wouldn't be favorable; but as to what a member might do in recommending him, that's entirely up to the individual Lodge, over which I have no jurisdiction in matters of this kind.

Q. Now, the Section to which you referred was Section 4, which then provides that all applications for member-

ship, reinstatements to membership, or reinstatement upon deposit of withdrawal card, shall be ballotted on at the meeting at which the application is reported, unless challenged by a member in good standing.

If the applicant is challenged, this could be any member of the Local Union, could it not? A. Yes.

Q. If any applicant is challenged, the President will appoint an investigating committee of three who shall report not later than the next regular meeting.

Mr. Milledge: Excuse me. I think this intellectual debate about the terms of this Constitution can go on quite a long time. We've already stipulated that these all are essentially the same.

427 The Court: I'm inclined to agree.

Mr. Devaney: Your Honor, I have not wanted—

The Court: It speaks for itself. I suppose that Mr. Howard is entitled to be called on to some extent to construe it, but I think we can construe it also.

By Mr. Devaney:

Q. Now, are you familiar with the disciplinary action taken by any member of the Clerks who has worked for Florida East Coast during the period of the strike, Mr. Howard? A. Yes. I have a report on one incident.

Q. And what is that one? A. That was an incident involving Miss Anna M. Wright, I believe her name is, in Miami.

Q. Do you have those records with you? A. Yes, I do have them.

Q. Would you mind getting them, please. A. (Witness left the witness stand, obtained instrument, tendered same to Mr. Devaney, and resumed the witness stand.)

428 Mr. Devaney: While Mr. Shapiro is looking at those, may I just note for the record that at least some of the other provisions of the Constitution that are similar to those of the IBEW are Article 2, Section 4, appearing at page 111; Section 3(a), at page 79; Section

3(b), on page 79—correction on that. The Sections that I just mentioned are those in the earlier version, which are marked for identification as Defendants' Exhibit F1. Those page numbers would be different in the basic document marked as Defendants' Exhibit F.

By Mr. Devaney:

Q. The similar provisions are in both, are they not?

A. Practically the same.

Mr. Devaney: Again, would you mark this, please?

The Clerk: H.

(. . . Thereupon, the referenced material was received and filed in evidence as Defendants' Exhibit H.)

By Mr. Devaney:

Q. Does this constitute the complete file on this individual? You say the name was Wright, Anna? A. Do I say that? Anna M. Wright; right, that constitutes all that was—

429 Q. —given to you? A. Given to me. Whether the Local Lodge has any additional or not, I do not know.

Q. Now, in the—I note that the minutes of the meeting, Mr. Howard, say, in part, that:

"I, E. W. Pollard, being a member in good standing in Flamingo Lodge No. 751, charge that Miss Anna M. Wright, a member of Flamingo Lodge No. 751, violated Article 2, Section 4, of the Protective Laws of our Brotherhood, as set forth and in the stipulated manner as follows:

"On or about June 10, 1963, Miss Anna M. Wright did accept and perform work for the strikebound Florida East Coast Railway and did bid on and was assigned to position of stenographer-clerk in the office of the Assistant Freight Traffic Manager, Miami, Florida, as per Bulletin 1963-4, dated June 18, 1963, and signed by F. P. Oldfather, A.F. T.M.

"I make this charge in compliance with Article 10, Section 2 * * *".

430 And it goes on to say:

"As it is clearly evident that defendant Anna M. Wright either refuses or neglects to stand trial * * it is our duty to find said defendant in contempt, which report shall be conclusive and punishment expulsion."

And it is signed by the Chairman, Mr. Cooper; another name that I can't read, Susanna something.

The Witness: Maschue, M-a-s-c-h-u-e.

Q. Secretary, and McKinnon, Recorded. Right.

Q. And you have two witnesses, Committeemen? A. Right. That's R. W. Hayes and Leo Pasuik.

The Court: A little louder, please.

By Mr. Devaney:

Q. R. W. Hayes and Leo Pasuik? A. Yes.

Q. Now, even though the ultimate decision was expulsion for failure to attend the hearing on the charges, is it correct, Mr. Howard, that the basic violation was the fact that she had bid on a job during the period of the
431 strike? A. The correspondence would indicate that.

I did not personally handle the matter.

Q. I see. Now, this was all of the documentation you were given on this matter? A. Right.

Q. You have no other document? A. I have no other document.

Q. Are you familiar at all with Mr. Joseph M. Grimsley?
A. No, I'm not.

Q. Are you familiar with a Jessica Sparks? A. I don't know them personally.

Q. Do you know of any—

The Court: Do you know anything about their cases?

The Witness: No, I know nothing about cases involving either one of them. If any action has been taken against them, it hasn't been reported to me.

By Mr. Devaney:

Q. Now, are you familiar with anyone who has applied for membership in the Clerks Union and has been denied that membership, Mr. Howard? A. I have no knowledge of it.

Q. And none of this has ever come to your at-
432 tention? A. No, it hasn't.

Q. You simply do not know whether Jessica Sparks applied for membership and tendered dues and was rejected as a member, do you? A. No, I have no information on it but, according to my recollection, she was a member.

Q. She was a member? A. Yes.

Q. Is she now a member? A. I don't know.

Q. Does it refresh your recollection to recall that she also accepted a job later with the State of Florida? A. No, I have nothing on that.

Q. Do you recall any action taken against any member of the Clerks Union who accepted employment in some place other than Florida East Coast while the strike was in progress? A. No, I do not.

Q. Does the Clerks have a policy against members accepting such employment during the period of the strike? A. At other points in other industries?

Q. Yes. A. No, we have no policy.

Q. Now, I don't—perhaps you could find it faster
433 than I. (Tendering instrument to the witness) The earlier copy, this appears at page 117—it used to be Article 2, Section 14, page 117; I'm not sure where it appears now. Here is where—see if it appears to be the same Section 14? A. (Witness indicating on instrument to Mr. Devaney)

Q. Now, isn't this, Mr. Howard, a Section that deals with the limitations on the right of striking employees to obtain employment elsewhere? A. No, it isn't a restriction or a limitation. That Section is there solely for the

purpose of determining who is entitled to strike benefits.

Q. Well, what does that say? A. That striking employees securing employment elsewhere during the period of such strike or lockout shall be excluded from all strike benefits and must obtain permission—

The Court: Excluded from what?

The Witness: From all strike benefits.

By Mr. Devaney:

Q. All right. A.—must obtain permission from the Strike Committee before accepting any other employment.

Q. That's what I had in mind. Must obtain per-
434 mission before accepting any other employment?

A. That's—

Q. That's more than just strike benefits? A. No. That's in order for us to know that he is not entitled to strike benefits after he secures employment elsewhere.

Q. Now, you still have no recollection of Anna M. Wright, of action being taken against her because she first came to work for F.E.C. during the strike and later took a job with the State of Florida. You don't recall that?
A. You said Anna Wright?

Q. I'm sorry. Sparks; Jessica Sparks? A. No, I have no report on it.

Q. What is your—you are General Chairman, Mr. Howard? A. Right.

Q. Now, I note from this, apparently Mrs. Sparks—that this involved the St. Augustine Local. Is Mr.—are any of the officials of that Local here today? A. No, they are not.

Q. Now, one further thing, Mr. Howard:

On Anna Wright—she was—what happened to her? She was expelled? A. Yes, she was expelled.

435 Q. Now, is a person who is expelled barred from applying for membership again? A. No.

Q. Readmission? A. No.

Q. Isn't it true that Anna Wright did apply for readmission? A. I would have no knowledge of an application being made for membership in any Lodge until they had been accepted and reported to me as having become a member of a certain Lodge. I only get reports on additions to membership. I don't have any record of those who may make application.

Q. Would you recognize this, Mr. Howard, from—it's in the handwriting of Mr. Cooper. Do you know his handwriting? A. Yes. I would say that is his writing.

Q. You have no question that that is on authentic letter? A. No, there's no doubt in my mind but that was written by Mr. Cooper.

(Mr. Devaney handing instrument to Mr. Shapiro)

Mr. Shapiro: Your Honor, I think I'm going to
436 object to this exhibit on the ground that it's a letter written by somebody else, and being identified simply on the basis of a third party's recollection of how handwriting looks.

The Court: I'm satisfied of its authenticity by what Mr. Howard says. It's received.

(The referenced document was received and filed in evidence as Defendants' Exhibit I.)

By Mr. Devaney:

Q. That letter, signed by Mr. Cooper, indicates that she had applied for readmission and had been voted on and rejected; isn't that correct, a correct summation of it? A. That's correct.

Q. I show you again this which has been marked as Defendants' Exhibit G, which you have indicated you were familiar with? A. Right.

Q. Now, that is—I haven't compared it; if it is not identical, it is certainly very substantially similar to Defendants' D; is it not, Mr. Howard? Here it is. (Handing

document to witness) They both—A. They seem to be the same.

Q. They seem to be very, if not identical, certainly
437 very similar? A. Certainly very similar.

Q. Now, you heard Mr. DuPont. We reviewed some of the various provisions of D. Did you hear his testimony? A. I did.

Q. The same provisions appear in G; do they not? A. Yes.

Q. Now, you also state, as D did, that:

“It is understood that similar instructions are being issued by the duly authorized representatives of the other cooperating organizations.”

Then all the cooperating organizations are listed.

Do you know whether any of the cooperating organizations, other than the shop crafts and System Federation 69, issued similar instructions? A. I have not seen them.

Mr. Devaney: I have no further questions, Your Honor.

The Witness: I would like to ask that the file of the Anna Wright case, the original file, be returned to me.

Mr. Devaney: Mr. Howard, as we indicated with
438 the others, we will have that copied and it will be returned to you as soon as we have copies made.

The Court: I think as to all of them, you plan to put a copy in this file, don't you?

Mr. Devaney: The only thing that we do not plan to put copies of in are the Constitutions.

The Court: That's the only purpose for furnishing the copies, as far as I'm concerned, is to be made an exhibit here.

Mr. Devaney: That's right, Your Honor.

The Court: You may as well make yourself a copy of it while you have it.

Mr. Devaney: Oh, yes.

The Court: All right.

Mr. Devaney: But the thing we had not planned to make copies of were the Constitutions.

439 The Court: I understand. That's correct. But these—

Mr. Devaney: All of the other documents—

The Court: —these disciplinary files that the various Chairmen—

Mr. Devaney: Quite correct, Your Honor; all those will be copied and the file will be put in here, the originals returned to the owners and the other parties will have a copy.

The Witness: You may retain those Constitutions that I brought.

Mr. Devaney: Fine. Thank you very much.

The Court: You have plenty of yours?

The Witness: I have plenty.

The Court: Thank you very much.

Mr. Shapiro?

Mr. Shapiro: No questions.

440 Mr. Milledge: You can come down.

The Court: All right, come down.

(Witness excused)

Mr. Devaney: Mr. R. G. Smith.

R. G. Smith.

having been produced and first duly sworn as a witness on behalf of the defendants, testified as follows:

Direct Examination

By Mr. Devaney:

Q. For the record, would you state your name, please.

A. R. G. Smith.

Q. And what is your position with the union? A. I am General Vice President of the Brotherhood of Railway Car-men and also employee of the Florida East Coast Railway.

Mr. Shapiro: Your Honor, I wonder whether we could ascertain whether the same general line of questioning is

to be developed through Mr. Smith that's already been developed? If so, I would suggest that, if it's going to be cumulative, Mr. Devaney has now established
 441 facts which will be sufficient to support the defense he wishes to make respecting the union shop aspect of his case, if Your Honor should rule that that defense is a valid one.

The Court: Well, I think Mr. Devaney has my request not to duplicate in mind. I think he has in mind the stipulation that Mr. Allan Milledge suggested a few minutes earlier; just so far as is necessary to fill out the picture as you want to paint it.

Mr. Devaney: That's correct, Your Honor.

The Court: All right.

By Mr. Devaney:

Q. Now, Mr. Smith, you heard the stipulation that Mr. Milledge proposed and you heard the testimony of Mr. DuPont; isn't that correct? A. Yes.

Q. And Mr. Milledge has stated that all of the cooperating unions have similar provisions. You do not disagree with that, do you? A. No, but I wouldn't know about all of them. However, I would assume—

442 Q. I'm talking about just yours, just yours, Mr. Smith. A. Yes, ours does.

Q. Has similar provisions? A. Yes.

Q. Now, have there—in fact, you may check me on these if you like: I notice that at least Section 31 on page 23 and Section 77 on page 76 appear to be two of the provisions that are similar to those we discussed. (Indicating to witness) Now—A. I don't know whether it would be helpful to you or not, but this Constitution, there are two Constitutions involved.

Q. Oh, I see. A. There is one that became effective January 1 of this year. They are similar, though. I don't believe there are any—

Q. And this one is out of date? A. Yes, this one is out of date.

Q. I thought—perhaps I have another one and wasn't aware of it.

The Court: He says they are similar.

443 Mr. Devaney: All right, sir.

The Court: These provisions haven't been changed, I suppose, in years?

The Witness: Your Honor, I don't believe they have. I wouldn't say for sure but I don't believe they have been changed.

The Court: All right. Actually, the out-of-date one was the one that was in effect, I suppose, at the time the strike occurred?

The Witness: That's right.

Mr. Devaney: So far as I know—

The Court: Rather than the one effective January of this year?

Mr. Devaney: That's right. This was the one furnished, Your Honor. We don't seem to have another one.

The Witness: Well, I—

Mr. Devaney: I mean, we are not—

444 The Witness: Our General Chairman, Mr. Cooke, furnished this one and maybe—let's see, the new Constitution went into effect the 1st of January and it took some time to get them printed. Maybe he just hasn't—I have one I'll be glad to lend you.

Mr. Devaney: This is fine, if the provisions are similar.

The Witness: I just don't think there are any material changes in them.

Mr. Devaney: Fine.

By Mr. Devaney:

Q. Now, have there been any disciplinary actions, to your knowledge, Mr. Smith, with respect to any member of the Carmen's Union who has worked for Florida East

Coast during the period of the strike? A. None whatsoever. I understand we have some members that are working, paying dues.

Q. That are working? A. Yes, paying dues.

Q. Have any new members been admitted; that is,
445 employees who have—A. We have six separate
Lodges. While I was on this property for some 25
years as General Chairman, we negotiated most of the
agreements in the System Federation 69. I haven't had
much to do with it locally in four or five years now, but
we have six separate Lodges; but insofar as I know, no
application has been made. I don't believe there has.

Q. All right. Now, you say there have been no disciplinary actions so far as the—A. I'm reasonably sure of that because I was—I fought against it.

Q. Would that come to you if there were disciplinary action? A. I believe it would.

Q. Yes, sir. A. It wouldn't necessarily have to. I think I would know about it, but I would object to it.

The Court: What are you marking?

The Clerk: Defendants' J. The Constitution will be J and the By-Laws K.

(The referenced material was recieved and filed in evidence as Defendants' Exhibits J and K.)

446 Mr. Devaney: I have no further—oh—well, perhaps I'd better ask Mr. Cooke, since these belong to him. I have no further questions of this witness, Your Honor.

Mr. Shapiro: No questions, Your Honor.

The Court: Come down, Mr. Smith.

(Witness excused)